(12)

No. 06-134
Title: The Permanent Mission of India to the United Nations, et al., Petitioners
v.
City of New York, New York
Docketed: July 27, 2006
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (05-4260, 05-4263)
Decision Date: April 26, 2006
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 25 2006	Petition for a writ of certiorari filed. (Response due August 28, 2006)
Aug 24 2006	Brief of respondent City of New York in opposition filed.
Sep 5 2006	Reply of petitioners The Permanent Mission of India to the United Nations and The Permanent Representative of Mongolia to the United Nations.
Sep 6 2006	DISTRIBUTED for Conference of September 25, 2006.
Oct 2 2006	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 22 2006	Brief amicus curiae of United States filed.
Dec 29 2006	Supplemental brief of respondent City of New York filed. (Distributed)
Jan 3 2007	DISTRIBUTED for Conference of January 19, 2007.
Jan 19 2007	Petition GRANTED.
Feb 5 2007	SET FOR ARGUMENT ON Tuesday, April 24, 2007.
Feb 21 2007	Record received from U.S.D.C. for Southern District of New York. (1 box)
Feb 23 2007	Brief of petitioners The Permanent Mission of India to the United Nations, et al. filed.
Feb 27 2007	Record received from U.S.C.A. for 2nd Circuit. (1 box)
Feb 27 2007	Joint appendix filed.
Mar 2 2007	CIRCULATED.
Mar 5 2007	Brief amicus curiae of United States filed. (Distributed).
Mar 7 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 30 2007	Brief amici curiae of International Municipal Lawyers Association, et al. filed. (Distributed)
Mar 30 2007	Brief of respondent City of New York, New York filed. (Distributed)
Apr 12 2007	Reply of petitioners The Permanent Mission of India to the United Nations, et al. filed. (Distributed)
Apr 13 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 24 2007	Argued. For petitioners: John J. P. Howley, New York, N.Y.; and Sri Srinivasan, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Michael A. Cardozo, New York, N.

(1)

Supreme Court, U.S.
FILED

No. _____ 06-134 JUL 25 2006

In The OFFICE OF THE CLERK

Supreme Court of the United States

THE PERMANENT MISSION OF INDIA
TO THE UNITED NATIONS AND THE
PERMANENT REPRESENTATIVE OF MONGOLIA
TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the exception to sovereign immunity for cases "in which . . . rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality's lawsuit seeking to declare the validity of a tax lien on a foreign sovereign's real property when the municipality does not claim any right to own, use, enter, control or possess the real property at issue?

2. Is it appropriate for U.S. courts to interpret U.S. statutes by relying on international treaties that have not been signed by the U.S. Government and that do not accurately reflect international practice because they have only been signed by a limited number of other nations?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner The Permanent Mission of India to The United Nations is an agency and instrumentality of The Republic of India, a sovereign state.

Petitioner The Permanent Representative of Mongolia to The United Nations is an agent and instrument of The Republic of Mongolia, a sovereign state.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners The Permanent Mission of India to the United Nations and The Permanent Representative of Mongolia to the United Nations respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 26, 2006.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, dated April 26, 2006, is reported at 446 F.3d 365 and is reproduced at Appendix ("App.") 1.

The decision of the United States District Court for the Southern District of New York, dated July 7, 2005, is reported at 376 F. Supp. 2d 429 and is reproduced at App. 25.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion and order of the United States Court of Appeals for the Second Circuit, dated April 26, 2006. The United States Supreme Court has jurisdiction to review decisions of the federal courts of appeals by virtue of 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This appeal raises questions concerning the proper interpretation and scope of 28 U.S.C. § 1605(a)(4), reprinted at App. 46.

STATEMENT OF THE CASE

Petitioners each own a building in Manhattan that is devoted entirely to offices for their respective Permanent Missions to the United Nations and residences for the diplomatic staff attached to those Missions. Every resident in each building possesses either a G-1 or G-2 visa (limited to employees of a permanent mission of a recognized government accredited to an international organization and their immediate families) or an A-1 visa (limited to foreign diplomats and consular officers and immediate family). Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101 *et seq.*). Even though the properties in question are used exclusively to support the two sovereign states' diplomatic missions, the City of New York maintains that these two buildings are subject to the City's real property tax to the extent they are used as residences for diplomats other than an Ambassador or Consul General. As of January 2003, the total amount of taxes assessed by the City exceeded $16 million, after which time the City sued in New York State Supreme Court to enforce tax liens and collect the taxes that arose by operation of statute when the Missions resisted payment, based on their sovereign immunity. The City disclaimed, however, any right to foreclose on the properties or otherwise seek ownership, possession or control of the properties. App. 83-84. The City also instituted parallel actions to collect taxes from

other Missions, including the Republic of the Philippines. App. 4 at n.2.

The petitioners removed the actions to the United States District Court for the Southern District of New York under 28 U.S.C. § 1441(d), which provides for removal by a foreign state or its instrumentality. After discovery on the issue of jurisdiction, the petitioners moved to dismiss the City's actions under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602 *et seq.*, which provides that, subject to existing international agreements and to the enumerated exceptions in 28 U.S.C. § 1605, "a foreign state shall be immune from the jurisdiction of the courts of the United States or of the States. . . . " 28 U.S.C. § 1604.

The district court denied the motion, holding that the City's actions fell within the statutory exception to foreign sovereign immunity created by 28 U.S.C. § 1605(a)(4) for cases "in which . . . rights in immovable property situated in the United States are in issue." App. 5.[1] After requesting the views of the Department of State on the relevance of certain international conventions to the construction of § 1605(a)(4)'s "immovable property" exception, and the diplomatic and foreign relations consequences of recognizing the exception in this case, the Court of Appeals for the Second Circuit rejected the Government's advice and affirmed.[2] The court acknowledged that on "facts very

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[1] The district court found it unnecessary to decide whether the City's actions satisfied the separate FSIA exception under 28 U.S.C. § 1605(a)(2) for actions "based upon a commercial activity carried out in the United States by the foreign state." App. 5.

[2] The Court of Appeals concluded that appellate jurisdiction was proper under the collateral order doctrine. App. 5. *See generally Foremost McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990).

similar to those of this case," the Court of Appeals for the Third Circuit had found the "immovable property" exception did not allow jurisdiction over a New Jersey municipality's real property tax enforcement action against property used by Libya's United Nations Ambassador. App. 20 at n.15. Nevertheless, the Second Circuit rejected the Third Circuit's reasoning, agreeing instead with the district court below, that a real property tax enforcement action constituted a case "in which . . . rights in immovable property . . . are in issue." App. 2, 26.

On June 1, 2006, the Second Circuit stayed issuance of the mandate pending determination of a petition for a writ of certiorari in the Supreme Court.

REASONS FOR GRANTING THE PETITION

A. Review is Necessary to Resolve a Circuit Conflict

If the Second Circuit's ruling below is left to stand, foreign governments that own real property in New Jersey will be immune from real property tax lawsuits while foreign governments that own real property across the Hudson River in New York will be subject to real property tax lawsuits, even if they use the property exclusively for diplomatic purposes. The FSIA was enacted to eliminate "disparate treatment of cases involving foreign governments" because Congress recognized that resentment against disparate treatment in such cases carries "adverse foreign relations consequences." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 13 (1976). Consequently, the FSIA was enacted to provide the sole basis for subject matter jurisdiction over suits against foreign states, and to provide

for removal of state court actions to federal courts in light of "the importance of developing a uniform body of law." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 32 (1976). This Court should grant a writ of certiorari to resolve the Second and Third Circuits' conflicting interpretations of the FSIA's "rights in immovable property" exception to a foreign state's sovereign immunity found at 28 U.S.C. § 1605(a)(4) to avoid the inevitable disparate treatment of foreign governments that is sure to flow from the Second Circuit's ruling.

In *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985), the City of Englewood assessed real property taxes on property the Government of Libya had purchased in New Jersey for use as a "weekend retreat" by Libya's Head of Mission, and sued the Government of Libya in New Jersey Tax Court to enforce a tax lien and compel payment of real estate taxes. *Id.* at 32-33. Libya removed the case to federal court and moved to dismiss for lack of subject matter jurisdiction. *Id.* at 32. The district court denied the motion to dismiss, finding jurisdiction under the "rights in immovable property" exception to sovereign immunity in 28 U.S.C. § 1605(a)(4). *Id.* at 33-34.

The Third Circuit reversed. It read the text and history of § 1605(a)(4) merely as codifying "the recognized principle of international law that a sovereign may resolve *disputes over title to real estate within its geographical limits.*" *Id.* at 36 (emphasis added). The Third Circuit also relied on *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984) (Scalia, J.), *cert. denied*, 470 U.S. 1051 (1985), in which the D.C. Circuit had concluded that the statutory FSIA exemption, "like the traditional real property exception it was

intended to codify, is limited to disputes directly implicating property interests or rights to possession." *Id.* Based on the D.C. Circuit's reasoning in *Reclamantes* and its own analysis of the "plain language" of the statute and its legislative history, the Third Circuit concluded that § 1605(a)(4) did not provide jurisdiction to hear a dispute over enforcement of real property taxes or a tax lien because "[n]o one disputes Libya's title to the Englewood premises or its right to exclude others from possession thereof." *Id.*

Although the Second Circuit conceded that the *City of Englewood* case "involved facts very similar to those of this case," App. 20 at n.15, the Second Circuit issued a decision in this case in direct conflict with the Third Circuit's ruling, stating merely that "we decline to adopt the reasoning of *City of Englewood*." *Id.* The Second Circuit purported to rely on the D.C. Circuit's decision in *Reclamantes*, App. 19-20, the same decision the Third Circuit had read to support its opposite interpretation of the scope of the FSIA's "immovable property" exception to sovereign immunity.

As a result of the split caused by the Second Circuit's ruling in this case, the side of the Hudson River on which a foreign state locates a diplomatic mission now determines whether that foreign state's diplomatic mission is subject to local real estate tax litigation. The Second and Third Circuits' different interpretations of the *Reclamantes* opinion also render unclear whether the courts have jurisdiction to enforce tax liens against property owned by foreign sovereigns in the District of Columbia. The need for uniformity in our nation's international relations mandates that the happenstance of where a foreign state locates its diplomatic property in the U.S. should not

determine the extent of that foreign government's sovereign immunity. Given that the D.C., Second and Third Circuits are three of the circuits in which the "immovable property" exception is most likely to arise, it is especially appropriate for this Court to resolve the current federal judicial circuit split over whether the "immovable property" exception in 28 U.S.C. § 1605(a)(4) extends jurisdiction to U.S. courts to enforce tax liens against real property used by foreign sovereigns for diplomatic purposes.

B. The Second Circuit Did Not Properly Consider the United States' Foreign Policy Concerns of Documented Retaliation Against U.S. Property Abroad and Inevitable Conflict with the United Nations

This is not New York City's first attempt to tax foreign diplomatic property. *See Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969). The City of New York has already sued the Republic of the Philippines, seeking a declaration of validity for a $17.7 million tax lien on the building housing the Philippines' Permanent Mission to the United Nations, and "the City has publicly named other embassies as offenders, and so may well seek to initiate further proceedings if successful here." App. 4 at n.2. Nearly 40 years ago in *Republic of Argentina*, a case heard before the FSIA was enacted, the State Department prophetically warned that "[i]f left unchecked," local government taxation of foreign government-owned real property "will prejudice and hamper the effective conduct of our foreign relations." *Republic of Argentina*, 250 N.E.2d at 700. The Department of State reiterated the very same warning in this case. App. 73-75.

Before ruling in this case, the Second Circuit invited the State Department's advice as to whether diplomatic and foreign relations concerns counsel a narrow or expansive interpretation of § 1605(a)(4). App. 53. In response, the State Department advised the panel that "[c]onsiderations of diplomatic and foreign relations counsel in favor of a narrow reading of the immovable property exception to sovereign immunity, and against an assertion of jurisdiction over this dispute over taxes on a diplomatic property." App. 73. It cautioned that "the U.N. diplomatic community would respond vigorously" to a ruling that allowed municipalities to enforce tax liens against their diplomatic missions and that "a finding of jurisdiction here would . . . trigger a confrontation between the United States and the United Nations that could have serious implications for their diplomatic relationship." App. 73-74. Indeed, it reported that "bilateral relations with one of the sovereign defendants have already been adversely affected by the suit and the district court's assertion of jurisdiction over this sovereign; specifically, the sale of a major piece of U.S.-owned property has been blocked." App. 74-75. Having solicited the State Department's advice, the Second Circuit thereupon rejected the State Department's concerns as "vague" and "speculative." App. 22 at n.17.[3]

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[3] The Second Circuit seems to have believed that the Government's concerns deserved less serious consideration because the Government did not submit a "statement of interest" under 28 U.S.C. § 517, but rather provided its views in response to the panel's invitation. App. 21 at n.17. Drawing a negative inference from the Government's initial silence is not consistent with the purpose of the FSIA, which was enacted in part to relieve the executive branch from the obligation to take sides in sovereign immunity disputes. *See Verlinden BV v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

Petitioners do not contend that the State Department's foreign policy views should necessarily govern the construction of § 1605(a)(4)'s "immovable property" exception. Nevertheless, the State Department's views on the foreign policy impact of a specific construction of the "immovable property" exception should be entitled to deference by the courts because matters of diplomatic and foreign policy concerns are uniquely within the province of the Executive Branch. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court taught that "the Executive's views on questions within its area of expertise merit greater deference than its opinions regarding the scope of a congressional enactment." *Id.* at 702 n.23. The Second Circuit in this case disregarded the lesson of *Altmann* and relegated its discussion of the Executive's views on the foreign policy impacts of interpreting the "immovable property" exception broadly to a single dismissive footnote, giving little, if any, deference to its views that "considerations of foreign policy . . . counsel heavily in favor of a restrained reading of the immovable property exception to sovereign immunity." App. 75. Given that the United States has 272 embassies, consulates, and diplomatic missions in 166 foreign countries, the diplomatic stakes in this litigation far transcend the interests of the specific parties and include the likely application of similar assertions of jurisdiction and taxation by local governments against U.S. Government-owned property in foreign countries. *See, e.g., Boos v. Barry*, 485 U.S. 312, 323-24 (1988) ("the concept of reciprocity that governs much of international law . . . ensures that similar protections will be accorded those that we send abroad to represent the United States . . . mak[ing] our national interest in protecting [foreign] diplomatic personnel powerful indeed."). Moreover, the negative foreign policy consequences

identified by the Executive were neither "vague" nor "speculative" and surely implicate pressing foreign relations concerns regarding the appropriate interpretation of the Foreign Sovereign Immunities Act that are deserving of serious consideration. As such, this Court's independent review of the Second Circuit's ruling below is warranted.

Additionally, given the diplomatic and foreign policy implications of the judgment below, we respectfully suggest that this case may be an appropriate case in which to invite the Solicitor General to express further the views of the United States.

C. The Second Circuit Impermissibly Used International Law to Expand the FSIA's "Immovable Property" Exception Beyond the Scope Warranted by the FSIA's Text and History

When considering the scope of the term "rights in immovable property" in the FSIA's real property exception to sovereign immunity, 28 U.S.C. § 1605(a)(4),[4] the court's task "is not to give the term the most expansive reading possible, nor to extract from different sources of law an artificial consensus definition of the term, but to determine what Congress meant by the language in this particular statute." *Asociacion de Reclamantes*, 735 F.2d at 1521 (Scalia, J.). Disregarding the D.C. Circuit's admonition, the Second Circuit largely ignored the common law and customary international law background against

[4] Under FSIA, foreign states are immune from jurisdiction in federal as well as state courts unless the dispute falls within one of the exceptions to immunity recognized by that Act. *Verlinden*, 461 U.S. at 489 (1983); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989).

which the FSIA was written. Instead, and again contrary to the Government's advice, it relied on two international conventions, the European Convention on State Immunity and the UN Convention on Jurisdictional Immunities of States and their Property,[5] to create what the Second Circuit called a "more detailed and workable standard" for § 1605(a)(4)'s exception to a foreign state's sovereign immunity. App. 20. Neither of the conventions relied upon by the Second Circuit accurately reflects international practice in 1976 when Congress enacted the FSIA, and neither reflects the current state of international law in 2006. Indeed, as the State Department advised the panel and as all the parties agreed, App. 58-59, 77 and 94, the European Convention and the UN Convention do not apply to cases like this one, but rather apply exclusively to the relations between states and *private* parties.[6] Moreover, neither document has been signed by the United States, or by the foreign sovereign petitioners in this case. Additionally, although the European Convention antedated the FSIA, it does not serve as a reliable indicator of international law because, while it has been open for signature for more than 34 years, only eight of the 46 member states of the Council of Europe have signed it. As for the UN Convention, it postdates the FSIA by 28 years

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[5] European Convention on State Immunity, May 16, 1972, ETS No. 74, *reprinted in* 11 ILM 470 (1972); U.N. Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 2, 2004).

[6] Although petitioners do not contend that the Executive Branch's views are necessarily determinative of the construction of § 1605(a)(4), to the extent that the Second Circuit relied on international conventions to interpret § 1605(a)(4), certainly the State Department's developed expertise in the application of those international conventions deserved deference and was relevant to the court's inquiry.

and has not been signed by a sufficient number of states to come into effect.

While international conventions may inform the proper interpretation of U.S. law intended to codify preexisting international law, it is not permissible to use international conventions that have not been signed by the United States, do not accurately reflect international practice and, in the case of the UN Convention, postdate FSIA to read into Congress's text a "more detailed and workable" standard that Congress did not supply. App. 20. Indeed, to the extent that the European Convention's text may be used to interpret what Congress meant, the relevant portions of the European Convention text have been identified in the FSIA's legislative history. Thus, 28 U.S.C. § 1607(b), which provides an exception to sovereign immunity for counterclaims "arising out of" the subject matter of the foreign state's claims, may properly be interpreted in light of the European Convention's similar language because the House Report says that this statutory exemption is "based upon article 1 of the European Convention." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 23 (1976). In contrast, Congress did not use the European Convention's "arising out of" language when it enacted § 1605(a)(4). While the European Convention's immovable property exception applies to all "obligations arising out of" immovable property, *see supra* n.5, ETS No. 74 at Art. 9, the U.S. Congress did not borrow the "arising out of" test for the immovable property exception when it enacted the FSIA. Rather, it selected very different language, applicable only to cases in which "rights in immovable property" are "in issue." 28 U.S.C. § 1605(a)(4). Where, as here, Congress selected the European Convention's broad "arising out of" language in one section of the statute, but

chose narrower "in issue" language in other parts of the same statute, basic rules of statutory construction require that the different language be given different effect. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely."). Accordingly, the only guidance available from the European Convention's immovable property exception is that Congress intended a narrower exception when it enacted § 1605(a)(4).

The Second Circuit's importation of the European Convention's "arising out of" test to expand the scope of § 1605(a)(4) is suspect for other reasons as well. At the time the FSIA was enacted, settled international practice used a broad "arising out of" test to identify when foreign sovereigns were *immune*. Under this test, a foreign sovereign was generally immune from suit in cases involving a "*claim arising out of* a foreign state's ownership or possession of immovable property," but the foreign sovereign was not immune from cases involving a claim "contesting such ownership or the right to possession." Restatement (Second) of Foreign Relations Law § 68, cmt. d (1965) (emphasis added); *see also Documents of the Thirty-Fifth Session*, 1983 Y.B. Int'l L. Comm'n 48, U.N. Sales No. E.84.V.7 (Part I) ("judicial practice . . . seems to bear out the absence of immunity for proceedings involving determination of ownership of property and its acquisition or title under the internal law of the State of the *situs* by the territorial court").

The Second Circuit also ignored the distinction under U.S. law between "rights in" real property and mere security interests in real property. As this Court held in

Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 262 (1999), liens "are merely a means to the end of satisfying a claim for the recovery of money." The City's lien is merely a device through which the City may seek to enforce its tax claim. The lien is not a "right in immovable property" as that phrase has traditionally been understood by United States courts. Rather, a lien is a mere "charge on [the] property," which "confers no general right of property." *Marine Midland Bank v. Marcal Enterprises, Inc.*, 398 N.Y.S.2d 782, 783 (N.Y. Co. Ct. 1977), *aff'd per curiam*, 407 N.Y.S.2d 833 (N.Y. App. Div. 1978); *see also* Restatement (First) of Property § 540, cmt. a (1944) (a lien is "merely additional security"); *Bertie's Apple Valley Farms v. United States*, 476 F.2d 291, 292 (9th Cir. 1973) (per curiam) (distinguishing between "title interest" in property as to which U.S. has not waived sovereign immunity and "lien interest"); *Terry Contracting Inc. v. State of New York*, 273 N.Y.S.2d 528, 532 (N.Y. Ct. Cl. 1966) ("[a] 'lien' is not a property in or right to the thing itself"), *rev'd on other grounds*, 280 N.Y.S.2d 450 (N.Y. App. Div. 1967).

This body of established U.S. domestic law at the time the FSIA was enacted strongly suggests that Congress intended to make a distinction between "rights in" real property and mere security interests (such as liens) when it enacted § 1605(a)(4). It is therefore not surprising that the Second Circuit failed to identify a single instance prior to the enactment of FSIA in which a court exercised jurisdiction over a foreign sovereign to adjudicate a dispute over the taxation of real property or the validity of a tax lien. The two state law cases upon which the court relied provide no support for its conclusion. In *Republic of Argentina*, the sovereign republic sued for, and won, a declaratory judgment that it was exempt from the City's

real estate tax and that the City's tax liens were void. 250 N.E.2d 698. The New York Court of Appeals agreed with Argentina and with the State Department that "under recognized principles of international law and comity the several states of the United States, as well as their political subdivisions, should not assess taxes against foreign government-owned property used for public noncommercial purposes." *Id.* at 700. Argentina waived its sovereign immunity from suit by "seeking affirmative benefit from the litigation," *i.e.*, a declaration that it was immune from taxation. *Aboujdid* v. *Singapore Airlines, Ltd.*, 494 N.E.2d 1055, 1059 (N.Y. 1986) (citing *De Sapio v. Kohlmeyer*, 321 N.E.2d 770, 772 (N.Y. 1974)). That the New York court accepted jurisdiction at Argentina's request provides no support for the Second Circuit's conclusion that "at the time of the FSIA's enactment, courts had jurisdiction to hear disputes such as this one" in which the City has sued unconsenting sovereigns to enforce a tax lien. App. 17 at n.12.

The Second Circuit's reliance on *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971), was equally misplaced. In *Glen Cove*, the United States won an injunction barring the local government from imposing or enforcing a real estate tax against property of the Soviet Union's Mission to the United Nations. The Soviet Union was not a party to that lawsuit, and Glen Cove's loss scarcely supports the notion that the city could have sued the unconsenting Soviet Union to enforce its tax.[7]

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[7] *The Schooner Exch. v. M'Faddon*, 11 U.S. (7 Cranch) 116, 145 (1812), does not support the proposition that "when owning property here" a foreign state subjects itself to the same local laws and burdens as any other property owner. App. 16-17. The quoted

(Continued on following page)

The Second Circuit's decision in this case raises important questions concerning the proper interpretation of a U.S. statute intended to codify international law. Where, as here, the lower court relied on international conventions that the U.S. and the majority of European States have refused to sign while ignoring well-settled contemporaneous international law to create a very broad real property exception to a foreign state's sovereign immunity under § 1605(a)(4) that is unsupported by prior U.S. legal precedent, and is in fact in direct conflict with a sister circuit's ruling, this Court should grant review of the decision.

D. The Second Circuit Erroneously Used Present-Day Appropriations Bills to Interpret What Congress Intended When Enacting 28 U.S.C. § 1605(a)(4) in 1976

The Second Circuit also turned to appropriations laws that were enacted in 2004 and 2005, almost 30 years after the FSIA was written, to support its proposition that in 1976 Congress intended the "immovable property" exception to the FSIA to grant jurisdiction to U.S. courts to enforce a tax lien against a foreign sovereign's property used exclusively to support its diplomatic mission. App. 5-6. These appropriations laws require that 110 percent of unpaid property taxes owed by any country be withheld from that country's foreign aid, with the exact amount of taxes due to be determined "in a court order or judgment entered against such country by a court of the United

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passage *distinguishes* between property that a "prince" acquires as a personal investment and the property owned and used by a sovereign in its sovereign capacity.

States or any State or subdivision thereof." Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, Pub. L. No. 109-102, 119 Stat. 2172, 2214-15, § 543 (2005); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, 118 Stat. 2809, 3011-12, § 543 (2004).

The Second Circuit's reliance on the two appropriations bills disregards this Court's repeated warning against using the "views of a subsequent Congress" to "infer[] the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960). This warning carries special force where appropriations bills are concerned. *See TVA v. Hill*, 437 U.S. 153, 190 (1973); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 629 (1990) (O'Connor, J., joined by Rehnquist, C.J., Scalia & Kennedy, J.J., dissenting), *overruled on other grounds* by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The effect of later appropriations bills on extant substantive legislation must be "construed narrowly." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984) (Bork, J.) (citing *United States v. Langston*, 118 U.S. 389 (1886)). Moreover, there is no reason to read these appropriations bills, as the Second Circuit appears to have read them, as a congressional endorsement of New York City's construction of the "immovable real property" exception. It is a simple fact that the FSIA's exception for actions "based upon a commercial activity" provides an independent basis for jurisdiction to enforce a tax lien where some or all of a foreign sovereign's property has been used for commercial purposes. 28 U.S.C. § 1605(a)(2). As such, Congress's requirement to withhold a country's unpaid property taxes from foreign aid by no means requires or even suggests that the FSIA's "immovable property" exception

must encompass jurisdiction for actions to enforce a tax lien. The Second Circuit's attempt to rewrite statutory history with present-day appropriations bills is unsupportable and should not be allowed to stand.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of these cases.[8]

Dated: New York, New York
July 25, 2006

Respectfully submitted,

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[8] As we noted earlier, we respectfully suggest that this case is an appropriate case in which to invite the Solicitor General to express the views of the United States.

446 F.3d 365

United States Court of Appeals, Second Circuit.

The CITY OF NEW YORK, Plaintiff-Appellee,

v.

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS and Bayaryn Jargalsaikhan, as principal resident representative to the United Nations of the Mongolian People's Republic, Defendants-Appellants, Great American Leasing Corporation and Jane Doe, The names of the last 20 defendants being unknown to the plaintiff, the persons or parties intended to be persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint, Defendants.

Docket Nos. 05-4260-CV(L), 05-42639-CV(CON).

Argued: Jan. 23, 2006.

Decided: April 26, 2006.

Norman Corenthal, Assistant Corporation Counsel (Kristin M. Helmers and John Low-Beer, of counsel), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, N.Y., for Plaintiff-Appellee.

John J.P. Howley (Robert A. Kandel and Robert Grass, of counsel), Kaye Scholer LLP, New York, N.Y., for Defendant-Appellee.

Before: KATZMANN and HALL, Circuit Judges, KORMAN, District Judge.[1]

KATZMANN, Circuit Judge.

This case arises out of the City of New York's (the "City") attempts to collect property taxes from certain

[1] The Honorable Edward R. Korman, Chief United States Judge for the Eastern District of New York, sitting by designation.

foreign missions to the United Nations that have been using parts of their embassy buildings for purposes that, the City argues, render at least those portions of those buildings subject to property taxation. The merits of that claim are not before us in this interlocutory appeal. Instead, we are called upon to answer a preliminary question of first impression in this circuit – whether, pursuant to the "immovable property" exception to the Foreign Sovereign Immunity Act's general rule that a foreign country is immune from suit in our courts, a federal court has jurisdiction to settle this dispute. We agree with the district court that it does have such jurisdiction and that this suit may go forward. The decision of the district court is affirmed and this case remanded for further proceedings.

I.

A.

While the merits of the City's claim are not before us, we set forth a condensed version of the underlying dispute to give some context to the discussion that follows.

The Permanent Mission of India to the United Nations (the "Indian Mission") is housed in a 26-floor building at 235 East 43rd Street in New York City that is owned by the Government of India. The first six floors, basement, and cellar of this building are primarily used for diplomatic offices, while the top 20 floors are devoted to residential units. Housed in these units are 16 diplomatic employees of the mission (all below the rank of Head of Mission or Minister Plenipotentiary) and their families, as well as security personnel and a driver; all of these

employees are citizens of India who receive this housing rent-free.

The Ministry for Foreign Affairs of the People's Republic of Mongolia (the "Mongolian Mission") is housed in a 6-story building at 6 East 77th Street in New York City that is owned by the People's Republic of Mongolia. The first two floors apparently are used for the mission's offices and the third floor for the Ambassador's apartment. The top three floors are used for six apartments, in which reside, rent-free, lower-level employees of the mission and their families. Both missions assert that, for various reasons, the housing of diplomatic employees on-site is essential.

Under New York law, real property owned by a foreign government is exempt from taxation if it is "used exclusively" for diplomatic offices or for the quarters of a diplomat with the rank of ambassador or minister plenipotentiary to the United Nations. N.Y. Real Property Tax L. § 418. On the other hand, "[i]f a portion only of any lot or building . . . is used exclusively for the purposes herein described, then such portion only shall be exempt and the remainder shall be subject to taxation." *Id.* At least since 1993, the United States Mission to the United Nations ("U.S.Mission") has indicated its agreement that portions of property not used for the specific purposes stated above, including those portions used to house lower-level diplomatic employees, will be subject to property taxation, absent a contrary bilateral agreement between the United States and the country at issue.

In accordance with its interpretation of this state law and applicable treaties, the City has been levying property taxes against the two properties in question for years, but

has had no success in getting the missions to pay. By operation of New York law, these unpaid taxes eventually converted into tax liens held by the City against these two properties. The City alleges that, as of February 1, 2003, the Indian Mission property was subject to about $16.4 million in unpaid property taxes and interest, while the Mongolian Mission owed about $2.1 million.

B.

On April 2, 2003, the City filed separate complaints in state court seeking judgments establishing the validity of the tax liens on the mission buildings.[2] Both missions (represented by the same counsel) removed their cases to federal court, where both cases were assigned to Judge Casey. After discovery limited to the jurisdictional question, the missions moved to dismiss for lack of subject matter jurisdiction.

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[2] Two other countries were also sued in this high-profile action. The City claimed that Turkey owed $70 million and that the Philippines owed $17.7 million. *See* Thomas J. Lueck, Bloomberg Sues 4 Countries, Saying They Owe City $100 Million, N.Y. Times, 4/10/03, at D3. Turkey, which the City alleged had rented out part of its consulate to the Bangladesh Mission, settled for $6 million. *See* Joanne Wasserman, City Plucks 6M in Taxes From Turkey, N.Y. Daily News, 10/1/03, at 19. Meanwhile, the case against the Philippines, which was also assigned to Judge Casey, has proceeded to summary judgment on the merits, because the Philippines chose not to join the instant motion to dismiss. *See City of New York v. Republic of the Philippines*, 03-cv-6085, 2004 WL 2710026 (S.D.N.Y.2004) (RCC). We are not aware of any other pending actions of this nature, but the City has publicly named other embassies as offenders, and so may well seek to initiate further proceedings if successful here. *See* William Sherman and Bob Port, A Towering Slap in City's Face, N.Y. Daily News, 10/24/04, at 4 (citing Hungary, Guinea, Nepal, and Nigeria in addition to the countries already mentioned).

In a thoughtful, well-researched opinion dated July 6, 2005, Judge Casey denied the motions on the ground that these suits implicate the "immovable property" exception to the Foreign Sovereign Immunity Act's ("FSIA") general rule that foreign governments are immune from suit. *See City of New York v. Permanent Mission of India to the United Nations,* 376 F.Supp.2d 429 (S.D.N.Y.2005). He did not reach the City's alternative argument that the suits also implicate the FSIA's "commercial activity" exception.[3] This interlocutory appeal followed. *See Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.,* 204 F.3d 384, 387 (2d Cir.2000) (immediate appeal is permitted, pursuant to the collateral-order doctrine, of denial of motion to dismiss for lack of subject matter jurisdiction under the FSIA).

Meanwhile, Congress has been actively involved in the issues directly pertaining to this litigation. Provisions included in appropriations bills enacted in each of the past two years require that 110 percent of unpaid property taxes owed by any country be withheld from that country's foreign aid. For unpaid property taxes to be subject to this withholding requirement, however, the amount owed must be determined "in a court order or judgment entered against such country by a court of the United States or any State or subdivision thereof." Foreign Operations,

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[3] This exception provides that a foreign state shall not be immune from jurisdiction in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005); Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004). Thus, this provision cannot be triggered if no court can adjudicate the property tax controversy.

II.

A.

Against this backdrop, we begin by noting that we review *de novo* the district court's conclusions of law regarding jurisdiction under the FSIA.[4] *Cabiri v. Gov't of the Republic of Ghana,* 165 F.3d 193, 196 (2d Cir.1999).

The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.,* 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1988). Under the FSIA, a foreign state is presumptively immune from suit. *Saudia* [sic] *Arabia v. Nelson,* 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). However, the FSIA contains several exceptions to this general rule of immunity. The party seeking to establish jurisdiction bears the burden of producing evidence establishing that a specific exception to immunity applies, but the foreign state then bears the ultimate burden of persuasion on this question. *See Virtual Countries, Inc. v. Republic of South Africa,* 300 F.3d 230, 241 (2d Cir.2002); *Cargill Int'l S.A. v. M/T Pavel Dybenko,* 991 F.2d 1012, 1016 (2d Cir.1993)

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[4] While we review for clear error any factual findings made by the district court, *see Shapiro v. The Republic of Bolivia,* 930 F.2d 1013, 1016 (2d Cir.1991), it does not appear that the district court resolved any material factual disputes.

B.

In this case, the City argues that jurisdiction lies under the FSIA's "immovable property" exception. This exception provides that a foreign state shall not be immune from jurisdiction in any case in which "rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The parties take very different stances on how expansive this exception is. The defendants argue that the immovable property exception is limited to cases in which the parties dispute title, ownership or possession of the immovable property itself. The City argues that the exception extends much more broadly, including to actions to adjudicate the validity of a tax lien. This is a question of first impression in this circuit.

We begin, as always, with the language of the provision. *See, e.g., United States v. Gayle,* 342 F.3d 89, 92 (2d Cir.2003); *United States v. Velastegui,* 199 F.3d 590, 594 (2d Cir.1999), cert. denied, 531 U.S. 823, 121 S.Ct. 67, 148 L.Ed.2d 32 (2000). Its general parameters are clear in two respects, neither of which is disputed by either party. First, it is restricted to "immovable property situated in the United States," *i.e.,* real estate located in this country. Second, its application is limited to cases in which rights in such real estate "are in issue." Thus, it does not apply to disputes that arise out of such rights in real estate but do not actually place them at issue. *See Asociacion de Reclamantes v. The United Mexican States,* 735 F.2d 1517, 1523 (D.C.Cir.1984) (Scalia, J.).

What is controverted here is what is meant by "rights in" immovable property. Textually, we find that this phrase is more plausibly read to support the City's position than

the defendants'. By its terms, the provision does not limit itself to cases in which the specific right at issue is title, ownership, or possession, and it certainly does not specifically exclude cases in which the right at issue is a lien.[5] Nor does the plain language restrict this provision to cases where the *foreign government's* rights in the property are in issue, as defendants suggest; a purely textual analysis suggests that it would suffice that the City's rights in the property (which are simply the flip side of the defendants' obligations with respect to the property) are in dispute. However, the text also does not explicitly confirm the City's position, and we find it sufficiently ambiguous that an investigation of the legislative history is in order. *See Gayle,* 342 F.3d at 93-94 ("Resort to authoritative legislative history may be justified where there is an open question as to the meaning of a word or phrase in a statute, or where a statute is silent on an issue of fundamental importance to its correct application.").

Until the middle of the last century, the United States followed what is known as the "classical or virtually absolute theory of sovereign immunity," the animating principle of which was that "a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign." *See* Letter from Jack B. Tate of May 19, 1952,

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[5] Defendants argue that liens are not rights in real estate at all, but merely "security interests." We find this argument unconvincing; a security interest is certainly a different type of right than, say, a possessory or ownership interest, but it remains nonetheless a species of "right" as that term is generally understood in the legal system. *See* Black's Law Dictionary 1347 (8th ed.1999) (one definition of "right" is "[t]he interest, claim or ownership that one has in tangible or intangible property"); *id.* at 941 (defining a "lien" as a "legal right or interest that a creditor has in another's property").

26 Dep't of State Bull. 984 (1952) (the "Tate Letter"), reproduced in *Dunhill v. Republic of Cuba*, 425 U.S. 682, 712, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976). In 1952, the Tate Letter announced the United States' decision to join most other countries in switching to the so-called "restrictive theory" of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." *Id.* at 711, 96 S.Ct. 1854. It is clear from the legislative history and settled in our caselaw that Congress's intent in enacting the FSIA was to largely codify the restrictive theory of sovereign immunity set forth in the Tate Letter. *See* H.R. Rep. 94-1487 (1976) (the "House Report"), reprinted at 1976 U.S.C.C.A.N. 6604, 6605; *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992). Applying the general principle that animates the Tate Letter and, thus, the FSIA itself – immunity is available only where a state is acting in a sovereign capacity, and not with respect to a state's "private acts" – we think ownership of real estate in a foreign country must be considered the latter, because ownership itself is not inherently a sovereign act.

With respect to the specific issue confronting us, the Tate Letter says only: "There is agreement by proponents of both [the classical and the restrictive] theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted)." Tate Letter at 711. Defendants argue that this passage in the Tate Letter (assumed to be adopted by the FSIA) precludes jurisdiction for cases involving diplomatic property. However, as actually codified in the FSIA, the

diplomatic property exception applies only to protect property used for such purposes from attachment or execution following a judgment. *See* 28 U.S.C. § 1610(a)(4)(B) (stating that immovable property situated in United States is subject to attachment, "*Provided,* That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission"). Thus, it is quite clear from the text that the FSIA does not bar jurisdiction, but does bar certain remedies, on the basis of a property's diplomatic status.[6]

This understanding is confirmed by reliable legislative history. In general, the House Report restates the immovable property exception in terms as broad as, or even broader than, those used in the text itself. *See* House Report at 6618 (provision "denies immunity in litigation relating to rights in real estate"). In addition, it confirms that consideration of a property's diplomatic status takes place with respect to available remedies, not with respect to jurisdiction. *See id.* at 6619 ("Actions short of attachment or execution [of the diplomatic property] seem to be

[6] This does not mean that the FSIA is in conflict with the Tate Letter on this point, because the Tate Letter referenced not simply the jurisdictional aspects of sovereign immunity codified in the FSIA but also the invocation of sovereign immunity as a defense on the merits, where diplomatic property receives some degree of special protection. In particular, the Vienna Convention on Diplomatic Relations, to which the United States is a party, states: "The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered." Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 23, § 1 (1972). Undoubtedly, the parties will have differing interpretations of what protections this provision offers defendants, but that is a question for the merits, not of jurisdiction under the FSIA.

permitted under the [Vienna Convention on Diplomatic Relations], and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.").[7]

Moreover, the narrow interpretation of the immovable-property exception put forward by defendants is difficult to square with Congress's explicit reliance on the courts to adjudicate the property tax liabilities of foreign governments. *See* Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005); Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004) (requiring that amount owed be determined "in a court order or judgment entered

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[7] We do not address today the potential significance of this statement in the House Report with respect to any remedy that the City might seek if successful on the merits, and so it is unnecessary at this stage of the litigation to explore the extent to which a lien is "similar" to ownership, rent, or a servitude. With respect to the rights that can be adjudicated – the question now before us – we disagree with defendants' assertion that this statement limits the rights that can be at issue with respect to diplomatic property to "questions of ownership, rent, servitudes, and similar matters." There is no indication that the drafters of the House Report meant this passage as such a limitation; rather, read in context, it was intended to make clear that any actions that do not disturb a foreign state's possession of the premises are permitted, up to and including suits involving questions of ownership. We observe that the defendants' interpretation has no corollary in the text actually adopted by Congress, which imposes no such limitations on the types of property rights that permit jurisdiction and addresses the subject of diplomatic property only with respect to available remedies, not with respect to available rights. *See York River House v. Pakistan Mission to the United Nations*, 1991 WL 206286, 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y.1991) (Leval, J.) (finding that this legislative history could not overcome fact that statutory language contained "neither a clear assertion of, nor even an ambiguous reference to, such an exception").

against such country by a court of the United States or any State or subdivision thereof" before it is withheld from foreign aid). Here, adoption of the defendants' proposed interpretation of FSIA would make dead letters out of Congress's recent enactments, which were intended to address the exact controversy before us today, because no court could provide the adjudication required to trigger them. We do not lightly reach such a result, and certainly will not do so where nothing in the statutory language or legislative history remotely requires it.

Finally, because the FSIA was intended to codify an already existing practice of following the restrictive theory of sovereign immunity, and because that policy was itself meant to bring the United States into conformity with other countries that had already adopted or were in the process of adopting the restrictive theory, it is instructive to look at contemporaneous expressions of the content of this exception to sovereign immunity for actions involving real property owned by the foreign state. *See Reclamantes,* 735 F.2d at 1521. First, the Restatement (Second) of Foreign Relations Law of the United States, the most recent restatement at the time of the FSIA's adoption, states that a foreign state's immunity does not extend to "an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction." Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965). Thus, at the time of the FSIA's adoption, any action to

"establish a property interest in immovable property" was permissible.[8]

Second, the European Convention on State Immunity, which was drafted in 1972 and ratified in 1976, just prior to the enactment of the FSIA, states:

> A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to: (a) its rights or interests in, or its use or possession of, immovable property; or (b) its obligations arising out of its rights or interests in, or use or possession of, immovable property and the property is situated in the territory of the State of the forum.

European Convention on State Immunity, May 16, 1972, ETS No. 74 ("European Convention"), art. 9. The European understanding – presumably known to the drafters of the FSIA – was that this exception covered a broad range of suits, including those arising out of the foreign state's obligations stemming from its ownership of property.

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[8] Defendants make much of comment d to this rule, which states that the rule "does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." They argue that this indicates that the exception is limited to cases contesting ownership or possession. However, the illustrations to this comment make clear that it does not limit the types of interests that can be involved, but rather clarifies that those rights must actually be "in issue," to use the language with which the FSIA codified this understanding. For example, the Restatement (Second) notes, a state can bring a proceeding in eminent domain to condemn real property owned by a foreign state. By contrast, the immovable property exception does not preclude immunity in a suit brought by a plaintiff who is injured on the defendant's property. *See* Restatement (Second) § 68 comment d (1965).

Of course, we must take note that Congress elected not to use the far more detailed language of the European Convention. Yet nothing in the vague but broad formulation used in the FSIA ("rights in immovable property situated in the United States are in issue") precludes its interpretation as synonymous to the European Convention's version. The European Convention version is split into two prongs, the first covering the foreign state's rights in the immovable property and the second addressing the state's obligations arising out of its ownership of property. Congress did not simply adopt language tracking the first prong, and thereby limit the reach of the immovable-property exception to cases in which the foreign state's rights in the property are at issue, but rather passed a provision that does not specify whose rights must be at issue. As indicated, *supra,* we think this provision therefore is most naturally read to cover not only the foreign state's rights in the property but also its obligations, *i.e.*, rights retained in the property by the local state or another party.

Shortly after the FSIA's passage, the International Law Commission (the "ILC") began work on what is now known as the United Nations Convention on Jurisdictional Immunities of States and Their Property (the "U.N. Convention"). In 1983, it finalized its version of the immovable property exception, which largely tracks the European Convention's version.[9] At that time, the United

[9] Specifically, it says a state cannot invoke immunity "in a proceeding which relates to the determination of: (a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum." U.N. Convention art. 13.

States member of the ILC stated his understanding that "[t]his article embodies the 'exception' to state immunity that is contained in [the FSIA] but is considerably more detailed." Stephen C. McCaffrey, *The Thirty-Fifth Session of the International Law Commission*, 78 Am. J. Int'l L. 457, 465 (1984). On December 2, 2004, after two decades of negotiations over the wording of other, more contentious provisions such as the "commercial activity" exception, the United Nations General Assembly adopted the U.N. Convention. *See* David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 194 (2005) (hereinafter, "Stewart, The UN Convention"). While expressing some concern about other provisions, the U.S. Mission applauded the U.N. Convention's exception for "claims with respect to rights or interests in real property within that foreign State," one of the exceptions that it declared "are widely recognized" and "have worked well." Statement by Eric Rosand, Deputy Legal Counselor, United States Mission to the United Nations, Oct. 25, 2004.[10]

Not only did the ILC draft a broad and detailed version of the immovable property exception, it gave a coherent account of why such an exception has always been recognized, even under the absolute theory of sovereign immunity. The acquisition and continued ownership of property in a foreign country "is made possible only by virtue of the application of the internal law or private law

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[10] By its terms, the U.N. Convention will go into force once 30 countries ratify it. As of September 30, 2005, 17 countries had done so. *See* http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIII/treaty38.asp. United States ratification is considered somewhat unlikely, for reasons wholly apart from the matter of the immovable property exception. *See* Stewart, The UN Convention, at 211 & n. 93.

of the State of the *situs*." International Law Commission, Documents of the Thirty-Fifth Session, II Y.B. Int'l L. Comm'n 47, U.N. Doc. A/CN.4/363 and Add.1 [1983]. Because ownership itself is only possible through the operation of local law, "[t]he outside State or extraterritorial State as an outsider must, from the start, fully recognize and respect the local or territorial internal law which unquestionably governs the legal relationship between the foreign State and the property so acquired." *Id.*

As the district court aptly put it:

> Foreign governments own, use, and possess land subject to the unique regulations of the forum jurisdiction; their property rights derive from, and are protected by, that regime. . . . [D]efendants purchased the land subject to New York's property law, including real-estate taxes and liens to enforce them.

City of New York, 376 F.Supp.2d at 435. We agree. Ownership of property connotes a bundle of related rights and obligations defined by local property law. A foreign state cannot assume the benefits of ownership – including the right to exclude others from the property with the assistance of the local government and, significantly, the right to sue those who violate its rights – while simultaneously disclaiming the obligations associated with them. When owning property abroad, a foreign state must follow all the same laws that pertain to private owners of such property, except to the extent that it can point to specific exceptions in that country's agreements with the United States, treaties, or other sources of law.[11] This principle – when

[11] Once again, whether and to what extent those rules apply and immunize the defendants from property taxation is a question for the

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owning property here, a foreign state must follow the same rules as everyone else – long predated the restrictive theory of sovereign immunity and the FSIA. *See The Schooner Exch. v. M'Faddon,* 7 Cranch 116, 11 U.S. 116, 145, 3 L.Ed. 287 (1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual."). We see no evidence that the FSIA was meant to alter it.[12]

We conclude that the "immovable property" exception to foreign sovereign immunity should be construed to include any case where what is at issue is: (1) the foreign country's rights to or interest in immovable property situated in the United States; (2) the foreign country's use or possession of such immovable property; or (3) the

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district court to consider on the merits, not a jurisdictional bar from suit under the FSIA.

[12] In particular, at the time that the FSIA was enacted, the New York legislation at issue in this case was already in place, a fact that surely was known to the FSIA's drafters. Indeed, in a case that likely will be discussed at length as this action reaches the merits, the New York Court of Appeals had recently held that international law (including treaties to which the United States was a party) limited the City's ability to collect property taxes from foreign governments. *See Republic of Argentina v. City of New York,* 25 N.Y.2d 252, 303 N.Y.S.2d 644, 250 N.E.2d 698 (N.Y.1969). In doing so, the state court observed that the United States, while then advancing the position that the City's ability to tax should be limited, explicitly disclaimed the position that the court did not have the authority to make its own determination as to the applicability of international law to the facts of the case. *Id.* at 258 & n. 1, 303 N.Y.S.2d 644, 250 N.E.2d 698. It thus seems clear that, at the time of the FSIA's enactment, courts had jurisdiction to hear disputes such as this one. *See also United States v. Glen Cove,* 322 F.Supp. 149, 153 (E.D.N.Y.1971) (finding federal jurisdiction to hear dispute over city's taxation of property owned by foreign government).

foreign country's obligations arising directly out of such rights to or use of the property.[13] We think this interpretation is the most consistent with the broad, albeit vague, language of the provision itself, as well as with the FSIA's general principle of withdrawing sovereign immunity where states act in the same manner as private actors. In addition, it gives effect to the intent of the FSIA's drafters "to bring American sovereign immunity practice into line with that of other nations." *Texas Trading & Milling Corp. v. Fed. Republic of Nigeria,* 647 F.2d 300, 310 (2d Cir.1981).

While this is our circuit's first opportunity to construe the immovable property exception, several of our sister circuits have done so before us. The first and most comprehensive of these opinions, *Reclamantes,* authored by then-D.C. Circuit Judge Antonin Scalia, rejected a claim by the successors in interest to the recipients of land grants from Mexico who were driven from their land by the United States and Texas in the period following the *Mexican-American War.* 735 F.2d at 1519. These plaintiffs claimed that, as a result of various subsequent events, Mexico had assumed the responsibility for compensating them for their lost land but had not done so. *Id.* at 1519. After recognizing that the plain language of the immovable property exception was "imprecise," *Reclamantes* delved into the legislative history and concluded, as we do, that the immovable property exception was enacted to

[13] Such obligations include only those imposed by the local government as part of its property law regime, and do not include standard tort liability. The FSIA contains a separate exception to immunity for suits arising out of "tortious act[s]" committed by foreign states and their employees. *See* 28 U.S.C. § 1605(a)(5).

codify "the pre-existing real property exception to sovereign immunity recognized by international practice." *Id.* at 1521. Under international practice at the time of the FSIA's enactment, the real property exception was "limited to disputes directly implicating property interests or rights to possession." *Id.* at 1522. By contrast, the *Reclamantes* plaintiffs' claims for compensation were not "property interests in real estate, such as a leasehold, easement or servitude, nor possessory rights, nor even rights to payment of money secured by an interest in land." *Id.* at 1523. The involvement of real property in the suit was "purely of historical interest, having no bearing upon present property interests." *Id.* at 1523.

We agree with the holding of *Reclamantes, i.e.,* that the immovable property exception is limited to disputes directly implicating present property interests,[14] as well as

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[14] Following *Reclamantes,* two other panels have denied jurisdiction under the immovable property exception on the ground that the disputes did not directly implicate present real property interests because the plaintiffs sought only money damages and not any adjudication of property rights. In *MacArthur Area Citizens Ass'n v. Republic of Peru,* 809 F.2d 918 (D.C.Cir.1987), a citizens' association alleged that the Republic of Peru had violated local zoning laws in remodeling a building for use as a chancery. The suit originally sought both injunctive relief and damages, but before any court could rule on the jurisdictional question, Peru voluntarily vacated the premises. As the suit stood by the time it reached the D.C. Circuit, the citizens' association did not seek to establish any rights in real estate, but rather sought damages in what was essentially a garden-variety tort claim, *Republic of Peru* found: "Upon analysis, the Association's complaint sounds not in the law of real property at all, but the law of nuisance." *Id.* at 921.

A similar situation pertained in *Fagot Rodriguez v. Republic of Costa Rica,* 297 F.3d 1 (1st Cir.2002), where plaintiffs, who had rented a house to the Consul and Vice-Consul of the Republic of Costa Rica, sued over non-payment of rent and sought to evict the diplomats. By the time the case reached judgment, however, the defendants had vacated

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the methodology it employed (looking at international practice around the time of the FSIA's enactment). Moreover, we agree with *Reclamantes*' suggestion in dicta that a broad range of property interests (including a security interest) can satisfy the exception. While *Reclamantes* had no occasion to specify with precision the types of property interests that would qualify, and so did not consult the international sources that we have consulted to provide a more detailed and workable standard, we think our holding today is entirely consistent with that case, and indeed builds upon the groundwork it laid.[15]

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the premises, leaving only a dispute about unpaid rent and other damages. Accordingly, *Republic of Costa Rica* concluded, what was left was "a simple contract dispute over nonpayment of rent," jurisdiction over which would usually be provided by the commercial-activity exception instead. *Id.* at 12-13.

As we read *Republic of Peru* and *Republic of Costa Rica*, they are cases about what it means for a property interest to actually be "in dispute." They thus spend little time exploring, and can tell us little about, what sorts of property interests would qualify. We neither express any opinion as to the correctness of their holdings (because there is no question that in the instant case the property interest involved is actually in dispute) nor attach much significance to their dicta regarding the types of property interests contemplated by the drafters of the FSIA.

[15] By contrast, we decline to adopt the reasoning of *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir.1985), which involved facts very similar to those of this case. In that case, the New Jersey city of Englewood attempted to tax a parcel of real estate Libya used as a "weekend retreat" for its Head of Mission to the United Nations and his immediate family and guests. *Id.* at 33. *City of Englewood* simply recharacterized the immovable property exception as a "title dispute exception." *Id.* at 36. Because "[n]o one disputes Libya's title to the Englewood premises or its right to exclude others from possession thereof," it concluded, the exception did not apply. While the City attempts to distinguish *City of Englewood* based on differing details of New York and New Jersey tax law, there is no indication that *City of Englewood* took such considerations into account. Rather than

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C.

Applying the standard we have described above to the facts of this case is simple. What is in dispute in this case is the extent of defendants' obligations under local law (here, property taxes) arising directly out of their ownership of real property in the United States.[16] The immovable property exception thus provides jurisdiction over this matter. Having reached this conclusion, like the district court, we decline to decide whether the commercial-activity exception is also implicated on these facts.

Although our conclusion is based on conventional methods of statutory interpretation, because of the politically sensitive nature of this case, we also have carefully considered the defendants' and the United States' arguments sounding in public policy and find that we are not persuaded.[17] In particular, we do not agree that our holding

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try to distinguish *City of Englewood*, we respectfully find it unpersuasive, in light of our prior discussion.

[16] The fact that the defendants' alleged obligations have converted into tax liens, and that this action thus seeks a declaration of the liens' validity in addition to a declaration of the defendants' underlying tax liability, is irrelevant to our analysis. We agree with the defendants that the City cannot use the device of a lien to create jurisdiction where none would otherwise lie, but we would reach the same result had this action been filed purely to obtain a declaratory judgment regarding defendants' property tax liability. Moreover, in simply affirming the district court's jurisdiction to hear this matter, we express no opinion as to whether a tax lien may be placed on diplomatic property.

[17] We note that the United States did not on its own initiative file a statement of interest, as it might have done, pursuant to 28 U.S.C. § 517. Rather, after briefing and argument by the parties, we solicited and have carefully considered the opinion of the United States in this matter, because the executive branch's views on matters implicating relations with foreign states are entitled to consideration. *See Republic of Austria v. Altmann*, 541 U.S. 677, 701, 124 S.Ct. 2240, 159 L.Ed.2d 1

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permits the City and other litigants to use creative pleading to "bootstrap" claims against foreign governments that otherwise would find no jurisdiction under the FSIA into exercises of the immovable property exception. The rule of *Reclamantes* – the dispute in question must actually arise directly out of the property interest in question – makes such fears groundless.

The instant dispute appears to revolve around the proper interpretation of a treaty (the Vienna Convention

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(2004). However, "interpretation of the FSIA's reach [is] a pure question of statutory interpretation" that is "well within the province of the Judiciary," and so the United States' views "merit no special deference." *Id.* Indeed, among the purposes of the FSIA were relieving the executive branch of the responsibility of case-by-case application of the restrictive theory of sovereign immunity and assuring litigants that their cases would be decided according to the pure application of law rather than in accordance with diplomatic pressures. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). It is particularly inappropriate to defer to the executive branch's legal views here because its position as to the proper scope of the immovable-property exception is inconsistent with its previous interpretation. As the United States acknowledges, the Department of Justice filed an amicus brief in 1985 in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir.1985), arguing that the immovable property exceptions of Section 1605(a)(4) and of the European Convention were consonant with each other and that property tax liens implicated the FSIA's immovable property exception. We have, however, looked carefully at the United States' brief statement of potential foreign policy concerns associated with the assertion of jurisdiction in this case. While such concerns could perhaps merit a dismissal on other facts, *cf. Garb v. Republic of Poland*, 440 F.3d 579, 584 & n. 6 (2d Cir.2006); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 59-60 (2d Cir.2005), we find none of the cited issues, presented in a largely vague and speculative manner, potentially severe enough or raised with the level of specificity required to justify presently a dismissal on foreign policy grounds. In the course of the proceedings remanded to the district court, the United States is, of course, free to file a further statement of interest if it thinks developments so warrant.

on Diplomatic Relations) and the application of that treaty to these facts. The Supreme Court has made clear that such a controversy is well within the competence and authority of the federal courts and is not a non-justiciable political question. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y,* 478 U.S. 221, 230, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (stating that "the courts have the authority to construe treaties"); *Baker v. Carr,* 369 U.S. 186, 211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."). Leaving such construction to the courts does not threaten the United States' compliance with international protections for diplomatic property; rather, the alternative – granting dismissal for want of jurisdiction whenever a defendant can raise a plausible claim of the treaties' applicability – could effectively expand the treaties' scope. In addition, Congress has specifically given to the courts – by way of a bill signed into law by the President – the role of deciding what property taxes are due from federal governments.[18]

We emphasize once again that the merits of this dispute are not before us. We express no opinion as to whether the City is correct that it may levy property taxes on those portions of embassy buildings that are used to house lower-level diplomatic employees. Nor do we express any opinion today as to what sorts of remedies will be available to the City should it prevail on its claim. Rather,

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[18] The United States suggests in passing that certain international fora may be more appropriate than our domestic courts for adjudication of controversies of this nature. No motion has been made to transfer this case to any other tribunal, and we express no opinion as to whether such a motion would have merit.

we hold only that the district court was correct in finding that it had jurisdiction to hear the controversy.

III.

Accordingly, the opinion of the district court is affirmed, and this case is remanded for further proceedings.

376 F.Supp.2d 429

United States District Court, S.D. New York.
THE CITY OF NEW YORK, Plaintiff,
v.
THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, Greatamerica Leasing Corporation, and "Jane Doe # 1" through "Jane Doe # 20", the names of the last 20 defendants being unknown to plaintiff, the person or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint, Defendants.
The City of New York, Plaintiff,
v.
The Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, and "Jane Doe # 1" through "Jane Doe # 20", the names of the last 20 defendants being unknown to plaintiff, the person or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint, Defendants.
Nos. 03 CIV. 3256(RCC), 03 CIV. 6086(RCC).

July 7, 2005.

Michael A. Cardozo, New York City, for Plaintiff.

John J.P. Howley, Robert A. Kandel, Robert Negron Jr., Kaye Scholer, LLP, New York City, for Defendants.

MEMORANDUM & ORDER

CASEY, District Judge.

In these actions the City of New York ("City") seeks declaratory judgments that it has valid tax liens against two properties in Manhattan – one owned by the Permanent

Mission of India to the United Nations ("India") and the other by the Bayaryn Jargalsaikhan as the Principal Resident Representative of the Mongolian People's Republic to the United Nations ("Mongolia") – as a result of unpaid real-property taxes, other charges, and interest. India and Mongolia ("Defendants") have moved to dismiss the complaints against them on the ground that they are immune from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. On what appears to be a matter of first impression in this Circuit, the Court concludes that India and Mongolia are not immune from suit because rights in immovable property situated in the United States are in issue. Accordingly, Defendants' motions are **DENIED**.

I. BACKGROUND

India and Mongolia use their respective properties as office and residential space related to their Missions to the United Nations. Since 1993, India has used the first six floors, basement, and cellar of its property for Mission offices and accessory space. (Ruchira Kamboj Aff. ¶ 3.[1]) Floors seven through twenty-six contain residential apartments, in which Mission diplomats and their families reside. (*Id.* ¶¶ 3-4.) Security personnel and a driver are housed on the seventh floor. (*Id.* ¶ 5.) No resident of the building pays rent or other costs of housing. (*Id.* ¶ 7.) Mongolia has used its premises for Mission office and residential space since 1980. (*See* Gansukh Purevjav Aff.

[1] Although a court is ordinarily confined to the pleadings in deciding a motion to dismiss, it may consult affidavits when the motion is directed to the court's subject matter jurisdiction. *See Gualandi v. Adams*, 385 F.3d 236, 244 (2d Cir.2004).

¶ 3.) The six-story building provides offices and housing for the Ambassador-Permanent Representative to the United Nations, four other diplomats, and an administrative officer and driver. (*Id.* ¶ 2.)

The City contends that Defendants must pay real-property taxes on those portions of the buildings that are used neither as Mission office space nor as an official residence for the countries' resident representatives to the United Nations with rank of ambassador or minister plenipotentiary. The City alleges that floors seven through twenty-six of India's premises are taxable because they are used exclusively as residences for staff below the rank of ambassador. India allegedly owes $16,376,702.09 in unpaid real-estate taxes, other charges, and interest accrued as of January 31, 2003. Mongolia allegedly has failed to pay $2,068,995.00 in real-estate taxes and interest accrued as of January 31, 2003. The sums sought stem from Mongolia's use of the fourth and fifth floors of its premises as residential space for staff ranking below the Mongolian Ambassador to the United Nations.

New York law requires the payment of real-estate taxes on portions of foreign-government property that is not "used exclusively for the purposes of maintaining offices or quarters, for [the principal resident representative or resident representative with the rank of ambassador or minister plenipotentiary], or offices for the staff of such representatives." N.Y.Real Prop. Tax Law § 418(1). New York law further provides, "If a portion only of any lot or building of any such [foreign] government or [principal resident] representative is used exclusively for the purposes herein described, then such portion only shall be

exempt and the remainder shall be subject to taxation unless otherwise exempt from taxation by law."[2] *Id.*

The City originally brought suit in New York State Supreme Court to enforce payment of the unpaid taxes assessed against those portions of the buildings alleged not to be exempt from taxation under the New York Real Property Tax Law. Defendants removed the cases to this Court pursuant to 28 U.S.C. § 1441(d), which provides for removal by a foreign state of any suit brought against it in state court. After jurisdictional discovery, Defendants moved to dismiss the suits against them for lack of subject matter jurisdiction. The Court received consolidated briefing and argument on the motions, which address the identical issue: whether this Court has jurisdiction under the FSIA to eventually adjudicate the validity of the tax liens.

II. DISCUSSION

The FSIA provides the sole basis for a court in the United States to exercise subject matter jurisdiction in a

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[2] The parties debate the application of the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, TIAS 7502, to the issue of immunity from taxation. The parties agree, however, that the Court cannot reach that issue unless it has subject matter jurisdiction, and that the question of subject matter jurisdiction must be answered with reference to the FSIA and not the Vienna Convention. The defendants have not challenged the complaints on the merits, and the Court therefore cannot decide on these motions whether resolution of the merits will turn on application of the Vienna Convention, either as a matter of federal law trumping the state provisions cited herein or as a matter of New York law under the clause, "unless otherwise exempt from taxation by law," N.Y. Real Prop. Tax Law § 418(1).

suit against a foreign state.[3] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). Under the FSIA, a foreign state is presumed to be immune from suit. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993). The party seeking to sue a sovereign bears the burden of overcoming this presumption by showing that a specific immunity exception applies. *See Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 241 (2d Cir.2002). The City asserts that the FSIA exception to immunity from suit in any case "in which rights . . . in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), removes immunity here.[4]

A. Defendants Are Not Entitled To Immunity Under the FSIA

The Court must begin its task of statutory interpretation with Congress's chosen language. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002) ("As in all statutory construction cases,

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[3] Although the FSIA states, *"[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act* a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" unless an exception applies, 28 U.S.C. § 1604 (emphasis added), the parties agree that the issue of jurisdictional immunity is controlled by the FSIA and not any preexisting international agreement.

[4] The City also asserts that the FSIA exception to immunity for any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state," 28 U.S.C. § 1605(a)(2), applies. Because the Court concludes that it has jurisdiction under the FSIA's "immovable-property" exception, it need not decide whether the "commercial-activities" exception applies.

we begin with the language of the statute."). As just mentioned, the FSIA provides that a foreign nation will be required to litigate suits implicating "rights in immovable property." But, as then-Judge Scalia has explained, the FSIA's use of this phrase is not very enlightening: "[T]he term 'rights in immovable property' is an imprecise one, susceptible of as many different meanings as there are areas of law for which that characterization of an interest may be relevant." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C.Cir.1984). Faced with this ambiguity, to determine what Congress intended to include within the immovable-property exception the Court must look to extraneous sources-international practice at the time the FSIA was enacted and the exception's legislative history. *See id.* (examining legislative history and the FSIA's purposes to determine what Congress meant by the language used in the immovable-property exception).

1. *International Practice When The FSIA Was Enacted*

Prior to 1952, federal courts in the United States, following the position of the State Department, generally granted foreign sovereigns complete immunity from suit. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). In 1952, the State Department's policy changed, as reflected in a letter that Acting Legal Advisor Jack B. Tate sent to the U.S. Attorney General ("Tate Letter"). *See Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) (plurality opinion) (reprinting the Tate Letter). The Tate Letter signified a shift from the absolute to a more restrictive theory of foreign sovereign

immunity. *Verlinden B.V.*, 461 U.S. at 487, 103 S.Ct. 1962. "Under the restrictive, as opposed to the 'absolute,' theory . . . , a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Nelson*, 507 U.S. at 359-60, 113 S.Ct. 1471. Despite these competing views, the Tate Letter explained that, "[t]here is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted)." Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 711, 96 S.Ct. 1854.

The restrictive theory of foreign sovereign immunity, set forth in the Tate Letter, was ultimately codified by the FSIA. *See* H.R. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 ("[T]he bill would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law."); *see also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-13, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (holding that the FSIA largely codifies the restrictive theory and that its terms must be read against the backdrop of international practice at the time the FSIA was enacted). The FSIA also adopted the Tate Letter's view that a sovereign may be sued with respect to real property. *Asociacion de Reclamantes*, 735 F.2d at 1521 (explaining that "[t]he immovable property exception was enacted to codify, with minor modifications . . . , the pre-existing real property exception to sovereign immunity recognized by international practice"). Accordingly, the House of Representatives Report on the FSIA notes that the immovable-property exception "denies immunity in litigation relating to rights in real

estate . . . located in the United States. It is established that, as set forth in the 'Tate Letter' of 1952, sovereign immunity should not be granted in actions with respect to real property, diplomatic and consular property excepted." H.R.Rep. No. 94-1487, at 20, 1976 U.S.C.C.A.N. at 6618-19.

The immovable-property exception was thus included in the FSIA in an effort to codify what the Tate Letter generally referred to as settled international practice under the restrictive, and even the absolute, theories of foreign sovereign immunity. But the FSIA itself sheds little light on what in 1976 was the settled international practice as to whether or when a sovereign could be sued in a real-property dispute. In addition, the FSIA does not discuss what the Tate Letter meant when it referred to "diplomatic and . . . consular property" as being excepted from immunity. *See* Tate Letter, *reprinted in Alfred Dunhill*, 425 U.S. at 711, 96 S.Ct. 1854. The answers to these matters serve as guideposts to whether Defendants may be subject to suit here.

International practice at the time of the FSIA's enactment "declined to extend the immunity of a foreign sovereign to 'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction.'" *Asociacion de Reclamantes*, 735 F.2d at 1521 (quoting Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965)). According to the Second Restatement, "[t]he immunity from jurisdiction of a foreign state [did] not extend to actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." Restatement

(Second) of Foreign Relations Law of the United States § 68 cmt. d.[5]

International practice at the time of the FSIA's enactment also reflected acceptance of the principle that "courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation." *Asociacion de Reclamantes*, 735 F.2d at 1521. This maxim effectively extended to international practice what is understood in domestic property jurisprudence to be the "local-action rule." *See id.* at 1522.[6] That this maxim has been incorporated into international practice is evident in a report of the International Law Commission ("ILC"). In 1977, the United Nations General Assembly gave to the ILC the task of examining and reporting on the international practice of sovereign jurisdictional immunity. *See* Stephen C. McCaffrey, *The Thirty-Fourth Session of the International Law Commission*, 77 Am. J. Int'l L. 323, 328 (1983). During the course of its work, and just a few years after Congress passed the

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[5] The commentary to the Second Restatement also provides that the immovable property exception "does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." Restatement (Second) of Foreign Relations Law of the United States § 68 cmt. d. But, as the court in *Asociacion de Reclamantes* explained, this provision merely clarifies that "a foreign sovereign was not immune in an eminent domain proceeding involving its property, but was immune in a negligence suit for injury suffered by a private individual while on its property." 735 F.2d at 1521.

[6] As the court in *Asociacion de Reclamantes* stated, the local-action rule "makes the locality's power exclusive and deprives other courts of jurisdiction to settle questions involving real estate." 735 F.2d at 1521-22.

FSIA, the ILC referenced the local-action rule as a reason to remove jurisdictional immunity when real property was at issue. The ILC report thus explained:

> As far as property is concerned, especially immovable property, the State of the *situs* exercises supreme authority as part and parcel of its sovereignty. Indeed, the concept of ownership and other proprietary rights or interests can only exist within the framework of the legal system of the *situs*, and such a concept is bound to be inherently absorbed within the notion of territorial sovereignty of the State of the *situs* itself. . . .
>
> The applicable law is unmistakably the *lex situs* as no other law can be more proper than the law of the place where the property is situated. *A fortiori* the régime or legal relationship with regard to land or immovable property, with its peculiar history, niceties and complexities, has developed in response to the needs of the territorial society, its traditions, usages and customs. Every system of land law or law concerning immovable property is unique in itself. Its exclusive applicability cannot be disputed, since ownership and other proprietary rights or interests in property do not and cannot exist except within the framework and purview of the *lex situs*. The supremacy of the *lex situs* and its sole authority in regard to property have rendered the assumption and exercise of territorial jurisdiction by the *forum rei sitae* all the more inevitable; in the absence of any alternative or competitive system of law, neither the *lex patriae* nor the *lex fori* of an extraterritorial authority could qualify to replace or supplant either the jurisdiction of the *forum rei sitae* or the exclusive applicability of the *lex situs*.

International Law Commission, *Documents of the Thirty-Fifth Session*, [1983] II Y.B. Int'l L. Comm'n 46-47, U.N. Doc. A/CN.4/SER.A/1983/Add.1(Part 1).

When the FSIA was enacted, international law recognized that real property was a matter of unique local import, such that local courts were best equipped to decide all issues pertaining to it. Against this backdrop, a sovereign necessarily acknowledges the supremacy and jurisdiction of local courts when it purchases property, which it will own, use, and possess within the framework of that local law. These general principles have equal force to the dispositive issue here: whether a federal district court may adjudicate the validity of a municipality's tax liens levied against a foreign sovereign's real property. A tax lien is a mechanism created by local law to ensure that landowners pay real-estate taxes. The meaning of such a lien is understood only by resort to the local law from which it originates. Principles of international law thus contemplate that courts sitting in the locality that created the tax lien possess the sole authority to adjudicate issues related to the lien. Hence, international practice at the time of the FSIA's enactment would not provide immunity from the claims asserted here.

Contrary to Defendants' assertion, referring to local law to define the contours of the FSIA's immovable-property exception is not incompatible with Congress's intention of achieving uniformity in the area of foreign sovereign immunity. It is true that the FSIA was intended to create a uniform regime of foreign sovereign immunity. *See* H.R. Rep. 94-1487, at 13, 1976 U.S.C.C.A.N. at 6611 ("[J]urisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may

have adverse foreign relations consequences."). But the FSIA codifies the exception for real-property suits as it existed under international practice, and that practice responds to the historical reality that "[e]very system of land law or law concerning immovable property is unique in itself." International Law Commission, *Documents of the Thirty-Fifth Session, supra*, at 47. Foreign governments own, use, and possess land subject to the unique regulations of the forum jurisdiction; their property rights derive from, and are protected by, that regime. Because Defendants purchased the land subject to New York's property law, including real-estate taxes and liens to enforce them, they are subject to the resolution of suits arising under that law in New York courts. The FSIA's goal of uniformity is not undermined by, but rather recognizes, that the substance of the applicable property law will necessarily depend on the jurisdiction in which the property is located. That is the very rationale for the local-action rule and the corresponding international practice that the FSIA adopts.

2. *The FSIA's Legislative History*

The legislative history behind the immovable-property exception also suggests that Congress believed matters such as tax liens would lay within that exception. As the court in *Asociacion de Reclamantes* explained, the examples in the House Report that fall within the exception – "questions of ownership, rent, servitudes, and similar matters," H.R. Rep. 94-1487, at 20, 1976 U.S.S.C.A.N. at 6619 – are consistent with the international practice that limited the exception to "disputes directly implicating property interests or rights to possession," *Asociacion de Reclamantes*, 735 F.2d at 1522. Congress intended that

matters similar to ownership, rent, and sérvitudes were to be justiciable; a lien is just such a "similar" matter. The common legal meaning of "servitude" at the time Congress enacted the FSIA was "[a] charge or burden resting upon one estate for the benefit or advantage of another." Black's Law Dictionary 1535 (4th ed.1968). A servitude is therefore a type of encumbrance on property. *See id.* at 908 (defining "incumberance" as "[a]ny right to, or interest in, land which may subsist in another to the diminution of its value, but consistent with the passing of the fee"). At the time the FSIA was enacted, a lien was generally understood to be a "charge or security or incumbrance upon property." *Id.* at 1072. It also has a similar meaning in New York. *See* N.Y. Real Prop. Tax Law § 102(21) ("'Tax lien' means an unpaid tax, special ad valorem levy, special assessment or other charge imposed upon real property by or on behalf of a municipal corporation or special district which is an encumbrance on real property, whether or not evidenced by a written instrument."). Like a servitude, a lien on real property "runs" with the land. *See* Restatement of Prop. § 540 (1944) ("[A] lien is enforceable against the successors in title or possession of the promisor to the extent it was enforceable against him. . . ."). Both servitudes and liens, therefore, burden the land; in so doing, they directly affect the property owner's rights to alienate or convey the property. *See Republic of Argentina v. City of New York*, 25 N.Y.2d 252, 303 N.Y.S.2d 644, 250 N.E.2d 698, 702 (1969).

In *Republic of Argentina v. City of New York*, the New York Court of Appeals held, as a matter of customary international law, that a foreign state's consular property was immune from real-property taxes. *Id.* at 704. The City had argued that it could obtain a tax lien against the

property without offending the foreign sovereign's ownership. *See id.* at 702. The court responded that a lien would also offend the principles of sovereign immunity because "a lien has an immediate adverse effect upon the amount which the [foreign] government would receive on a sale, to sanction its imposition would constitute *a direct interference with the property of a foreign state*. . . ." *Id.* (emphasis added). The court's holding on the merits – that the City was barred from taxing consular property – is not relevant to the instant motion. But the Court of Appeals' observation that, as a matter of New York law, a lien is a direct interference with property rights, strongly favors the City's argument that a suit to adjudicate the validity of a lien puts rights in immovable property in issue. And in a more recent case, the Court of Appeals reiterated its view that tax liens "substantially affect the rights of property owners." *Zaccaro ex rel. Estate of Zaccaro v. Cahill*, 100 N.Y.2d 884, 768 N.Y.S.2d 730, 800 N.E.2d 1096, 1100 (2003).

The rationale behind these holdings is apparent. Part of an owner's rights in real property is the right to alienate or sell the property. The presence of a tax lien means that the owner does not have the power to convey full rights and title to another purchaser, but that any subsequent purchaser would take the property subject to the lien. Thus, a tax lien directly affects a property owner's rights in the property. And a suit adjudicating the validity of such a lien therefore puts in issue the owner's rights in that property. The claimed tax liens directly implicate Defendants' rights in their real property.

3. *Defendants' Specific Arguments Lack Merit*

Defendants maintain that the immovable-property exception does not apply because the tax liens would not deprive them of ownership or possession of the Mission premises. To support this proposition, they rely on *Rodriguez v. Republic of Costa Rica*, 297 F.3d 1 (1st Cir.2002); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir.1985); and *Fickling v. Commonwealth of Australia*, 775 F.Supp. 66 (E.D.N.Y.1991). These cases do not persuade the Court that the exception is as limited as Defendants would have it.

In *Rodriguez*, the plaintiffs sued the Republic of Costa Rica for unpaid rent; the Consul and Vice-Counsel who had been living on the premises had vacated by the time the case reached court and did not seek reinstatement. *See* 297 F.3d at 4-5, 11. The First Circuit held that "purely compensatory rights, without more, are insufficient to sustain jurisdiction under the immovable property exception." *Id.* at 11. That is so, the court held, because the rationale behind the exception is that foreign courts are not equipped to decide property disputes making it "important for property disputes to be adjudicated by local courts." *Id.* at 12 (citing *Asociacion de Reclamantes*, 735 F.2d at 1521). The plaintiffs argued that the House Report referred to actions for rent as among those that came within the exception under international law. The First Circuit rejected this argument, noting that the inclusion of actions for rent most likely referred to such actions that also involve issues of title and possession. *Id.* at 12-13.

The court also rejected the plaintiffs' contention that the Third Restatement of Foreign Relations Law supported their position. *See id.* at 13. The Third Restatement

provides that under the immovable-property exception, as a matter of international practice, "controversies concerning payment of rent, taxes and other fees concerning [premises used for an embassy, consulate, or diplomatic mission] are subject to adjudication in local courts." Restatement (Third) of Foreign Relations Law § 455 cmt. b (1987). The First Circuit reiterated its conclusion that only suits implicating both rent and ownership or possession fall within the exception. *Rodriguez*, 297 F.3d at 13. The court determined that the Restatement referred to "rent, taxes and other fees" sought "in the process of adjudicating 'rights of ownership, possession, occupation or use.'" *Id.* (quoting Restatement (Third) of Foreign Relations Law § 455 cmt. b).

Defendants rely on *Rodriguez* to argue that only those suits that would deprive a foreign sovereign of ownership or possession of immovable property fall within the immovable-property exception. The First Circuit's holding, however, was not so broad. The court merely held that "the immovable property exception applies only in cases in which rights of ownership, use, or possession are at issue." *Rodriguez*, 297 F.3d at 13. *Rodriguez* was not among such cases because the plaintiffs were seeking money damages, essentially for breach of contract. Indeed, the court noted that a suit for nonpayment of rent "is, first and foremost, a contract dispute." *Id.* The court in *Rodriguez* therefore held nothing more than that contract disputes do not involve rights in immovable property simply because the alleged breach occurred during the use or possession of real estate. The result of a successful breach-of-contract suit would be the payment of money; a successful result in these actions, in contrast, would give the City a property right in the Mission premises that would "substantially

affect the rights of [Defendants as] property owners." *Zaccaro*, 768 N.Y.S.2d 730, 800 N.E.2d at 1100. Accordingly, *Rodriguez* does not command the result that Defendants desire.

Nor does *City of Englewood*. The court there held that the immovable-property exception did not apply to a suit by a municipality challenging a local tax board's decision to deny a tax increase on property owned by Libya, which argued that it could not be taxed at all. *See* 773 F.2d at 33. The Third Circuit only briefly discussed the immovable-property exception, simply noting the proposition that the exception "'is limited to disputes directly implicating property interests or rights to possession.'" *Id.* at 36 (quoting *Asociacion de Reclamantes*, 735 F.2d at 1522). The Third Circuit then concluded: "No one disputes Libya's title to the Englewood premises or its right to exclude others from possession thereof. Thus section 1605(a)(4) does not apply." *Id.* The court, however, did not explain why the suit to force the payment of real-property taxes did not directly implicate Libya's property interests even though the payment of such taxes was a condition of owning real estate in Englewood and arose only because of such ownership. In light of the treatment of the immovable-property exception in *City of Englewood*, that case does not offer Defendants adequate support to overcome the authority bolstering the City's position.

And *Fickling* is inapposite here. In *Fickling*, an Australia court issued a "caveat" during divorce proceedings, which precluded the plaintiffs from selling, transferring, and encumbering certain property. *See* 775 F.Supp. at 68. The plaintiffs sought to stretch the immovable-property exception to reach real estate located in the United States that the plaintiffs had used as collateral to

secure a loan from a foreign bank, and which the caveat prevented from being sold or encumbered pending the outcome of the divorce proceedings. *See id.* at 72. The plaintiff sued Australia, alleging jurisdiction to be founded on, among other things, Australia's expropriation of the plaintiffs' property rights.

The court held that the exception did not apply because Australia had not claimed to own or control the property. *Id.* The caveat was not a right in the U.S. property, but merely a procedural device to preserve the integrity of the Australian divorce court's jurisdiction over the marital dispute. The caveat was a product of Australian law, not New York property law as in the case of a lien. Unlike in cases concerning tax liens, the courts of New York have no special competence to adjudicate the propriety of a device originating in Australian law. The *Fickling* suit was an attempt to undo an Australian court order and was best addressed to the Australian court that issued it. Therefore, the rationale for the internationally recognized real-property exception that the FSIA codifies had no application in *Fickling*.

Finally, Defendants contend that the City's position would mean that any dispute could put rights in immovable property in issue, if, by action of state or local law, a litigant could place a lien on real estate. For example, the argument goes, if local law permitted a real-property lien to enforce a tort judgment, then the limitations in the FSIA on jurisdiction over tort suits could be eviscerated. *See* 28 U.S.C. § 1605(a)(5) (providing limited exception to sovereign immunity from tort suits). Or, in the example that the defendants cite, a plaintiff could use the immovable-property exception to "bootstrap" a claim that would not meet the commercial-activities exception's requirements

merely by seeking a lien on real property. While those specters may be raised legitimately elsewhere, they inspire no fear here. The claimed liens arise directly out of Defendants' ownership and use of real estate in the United States. The taxes that the City alleges it is owed are imposed due to ownership and use of the property, not indirectly as a result of some unrelated act such as a tort or breach of contract. Thus, the validity of the property liens "directly implicate[s] interests in the property" because the liens require adjudication of whether Defendants may own and possess the property free of local real-estate taxes. *See Asociacion de Reclamantes*, 735 F.2d at 1522.

B. The Tate Letter's Exception For Diplomatic Property Is Inapplicable

The exception for diplomatic and consular property to which the Tate Letter refers also does not require immunity in these cases. The House Report addressed the exception in the Tate Letter and noted:

> It is maintainable that the exception mentioned in the 'Tate Letter' with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property. Thus, the Vienna Convention on Diplomatic Relations . . . 23 UST 3227, TIAS 7502 (1972), provides in article 22 that the 'premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment, or execution.' Actions short of attachment or execution seem to be permitted under the Convention, and a foreign state cannot deny the local state

> the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed.

H.R.Rep. No. 94-1487, at 20, 1976 U.S.C.C.A.N. at 6619. According to the House Report, although suits that would disturb a foreign sovereign's ownership and possession of diplomatic premises might be barred, suits such as these that merely concern encumbrances like servitudes would not. Defendants, then, have it exactly backwards: where diplomatic property is concerned, the exception is not limited to suits that would deprive the foreign sovereign of ownership or possession.

If Defendants were correct that Congress only intended suits disturbing a sovereign's ownership or possession of immovable property to fall within the exception, then the observation in the House Report would make no sense. The legislative history suggests that Congress, consistent with its view of international law, intended to permit suits in which rights in diplomatic property were in issue as long as the suits did *not* seek to oust a foreign sovereign from ownership or possession of the property.

III. CONCLUSION

The international practice that the immovable-property exception codifies and the legislative history of the FSIA demonstrate that Defendants are not entitled to immunity from these claims because the tax liens place their and the City's rights in the Mission properties in issue. Accordingly, the Court may exercise jurisdiction under the FSIA to adjudicate the validity of those liens. It is worth emphasizing that this conclusion is not meant to

have any impact on the separate question of whether the properties are immune from taxation. The premises may or may not be exempt from taxation; the Court merely holds today that it is empowered to make that determination. Defendants' motions to dismiss for lack of subject matter jurisdiction are therefore **DENIED**.

So Ordered:

---

28 U.S.C.A. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage

to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to –

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of

torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph –

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if –

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime

lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That –

> **(1)** notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and
>
> **(2)** notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an

amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a) –

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years

after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery. –

(1) In general. – (A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset. – (A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may

stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would –

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. – The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. – A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. – Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
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JOHN M. WALKER, JR.
CHIEF JUDGE

ROSEANN B. MacKECHNIE
CLERK

January 9, 2006

BY MAIL AND FACSIMILE (FAX# 202-736-7541)

Wynne Teal, Esq.
Department of State
Office of the Legal Advisor
Office of Diplomatic Law and Litigation
2201 C Street NW
Washington, DC 20520

Re: *City of New York v. Permanent Mission of India*, 05-4260-cv

Dear Ms. Teal:

On January 23, 2006, a panel of the Second Circuit is scheduled to hear the case *City of New York v. Permanent Mission of India*, 05-4260-cv. This case requires the Court to decide whether New York City may sue foreign embassies over failure to pay property taxes allegedly owed, and in the process to interpret the "immovable property" exception to the Foreign Sovereign Immunity Act's general rule that foreign governments are immune from suit in United States courts. *See* 28 U.S.C. § 1605(a)(4) (providing that foreign governments shall not be immune in any case in which "rights in immovable property situated in the United States are in issue").

Our circuit has never before had occasion to interpret this provision, and the other circuits that have done so have taken very different approaches. *Compare Association de Reclamantes v. The United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984) (concluding that exception extends to "disputes directly implicating property interests Or rights to possession") *with City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 37 (3d Cir. 1985) (concluding that exception only applies where what is at issue is foreign government's "title to the . . . premises or its right to exclude others from possession thereof") *with Fagot Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 13 (1st Cir. 2002) (holding that dispute must "implicate rights of ownership, use, or possession" for exception to apply).

Given the ambiguity of the statutory language, the diverging interpretations this provision has received, and the possible implications for diplomatic relations that the Court's decision may have, the Court solicits any views the Department of State might have on the subject. While the Court would welcome any response, it is particularly interested in your views on:

> (1) Whether the "immovable property" exception should be interpreted to accord with the more detailed version of this provision found in Article 13 of the recently adopted United Nations Convention on Jurisdictional Immunities of States and Their Property, as well as that found in Article 9 of the European Convention on State Immunity, both of which disallow claims of immunity where proceedings relate to either: (a) a state's rights or interests in, or use of possession of, real property, or (b) a state's "obligations" arising out of the same?

(2) Whether any considerations of diplomatic and foreign relations counsel a relatively narrow or expansive reading of this exception?

We would appreciate a response of no more than ten single-spaced pages by **January 20, 2006, at noon.**

If you have any questions, please do not hesitate to call me. My direct line is 212-857-8585.

Very truly yours,

/s/ Roseann B. MacKechnie
Roseann B. MacKechnie
Clerk of Court

[SEAL]

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 3rd Floor
New York, New York 10007

February 23, 2006

BY HAND DELIVERY

The Honorable Roseann B. MacKechnie
Clerk, Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse, 40 Foley Square
New York, N.Y. 10007

Re: *New York City v. Permanent Mission of India, et al.*, 05-4260-cv *New York City v. Bayaryn Jargalsaikhan (Mongolia)*, 05-4263-cv

Dear Ms. MacKechnie:

We write on behalf of the United States Government in response to your letter of January 9, 2006, in which the Court invited the U.S. Department of State to provide its views on the following two questions:

> (1) Whether the "immovable property" exception should be interpreted to accord with the more detailed version of this provision found in Article 13 of the recently adopted United Nations Convention on Jurisdictional Immunities of States and Their Property, as well as that found in Article 9 of the European Convention on State Immunity, both of which disallow claims of immunity where proceedings relate to either: (a) a state's rights or interests in, or use of possession of, real property, or (b) a state's "obligations" arising out of same?

(2) Whether any considerations of diplomatic and foreign relations counsel a relatively narrow or expansive reading of this exception?

We enclose three additional copies of this letter, for distribution to the members of the panel (Katzmann, Hall, C.JJ., Korman, D.J.).

Summary of Responses

(1) No, the immovable property exception of the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. § 1605(a)(4), should not be interpreted to accord with the broader immovable property provisions of the United Nations Convention on Jurisdictional Immunities of States and Their Property ("UN Convention") or the European Convention on State Immunity ("European Convention;" together, "Conventions"), because (a) the Conventions do not address and therefore do not purport to abrogate immunity from tax liability disputes, and (b) the FSIA's immovable property exception is drafted more narrowly than the exceptions in the Conventions. Further, the FSIA precludes the Court's jurisdiction here.

(2) Considerations of diplomatic and foreign relations counsel in favor of a narrow reading of the immovable property exception to sovereign immunity.

I. Question One

A. The European and U.N. Conventions Do Not Abrogate Immunity from Tax Liability Suits

The Conventions do not address and therefore do not purport to abrogate sovereign immunity from suits over tax liabilities, and it is not apparent that the Conventions bear on the questions before the Court.

The European Convention: The United States is not a party to this Convention, which entered into force in 1976 and currently has eight parties. Article 9 of the European Convention abrogates immunity from suits between its parties as to a country's "rights or interests in, or its use or possession of, immovable property; or its obligations arising out of its rights or interests in, or use or possession of, immovable property." Article 29, however, provides that the European Convention "shall not apply to proceedings concerning . . . customs duties, taxes or penalties." The Convention's Explanatory Report articulates the intent of Article 29: "Article 9 covers . . . proceedings relating to payments due from a State for the use of immovable property . . . with the exception of dues or taxes." *Explanatory Report of the European Convention on State Immunity* (ETS No. 074) ¶ 44, http://conventions.coe.int/Treaty/en/reports/Html/074.htm. According to the Explanatory Report, taxes are excluded because "the Convention is essentially concerned with 'private law' disputes between individuals and States." *Id.* ¶ 113.

The UN Convention: This convention has not yet entered into force, has not been signed by the United States, and postdates the FSIA by 28 years. Further, although Article 13 appears on its face to contain a broad exception to immunity for "any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property," the UN Convention's negotiating history reveals that Article 13 (like Article 9 of the European Convention) was not intended to apply to tax disputes.

The early discussions within the International Law Commission[1] indicated that the drafters considered whether to include a provision that would have eliminated immunity from tax cases. In 1984, they drafted a "fiscal" article that waived sovereign immunity from suits to collect taxes on real property used for commercial purposes. Special Rapporteur's Sixth Report on Jurisdictional Immunities of States and Their Property, A/CH.4/376, 31 January 1984 at 50 (Article 17). This article was amended in mid-1984, and, although the language is broad on its face, the negotiating history indicates that it mirrors the exception of the earlier drafts, *i.e.*, removing the exception to immunity for suits on property used for commercial purposes. Report of the International Law Commission on the Work of its Thirty-Sixth session, 7 May – 27 July 1984 (A/39/10) at 163. Then, after years of review, this "fiscal" article (Article 15) was deleted in 1991, because, according to the Drafting Committee Chairman:

> the article concerned only relations between two States, the forum State and the foreign State; it therefore dealt with abilateral international problem governed by existing rules of international law. . . . The second reason [for deletion] was that the draft as a whole dealt with relations between a State and foreign natural or juridical persons, the purpose being either to protect the State against certain actions brought against it by such persons or, conversely, to enable those persons to protect themselves against the State. Hence, article 15, dealing as it did solely with inter-State relations, did not fall within the real

[1] Established in 1948, the International Law Commission ("ILC") has a mandate to develop and codify international law, in accordance with the Charter of the United Nations.

> scope of the draft articles; it merely gave rise to problems of interpretation *vis-á-vis* the diplomatic and consular conventions.

Yearbook of the International Law Commission 1991, Vol. 1 (Summary Records of meetings of 43rd Session, 29 April – 19 July 1991) at 84, ¶ 6.

The remaining Article 13 exception to immunity for immovable property of the draft UN Convention thus was not meant to apply to tax disputes, which had been deemed an aspect of "inter-State relations" outside the scope of the Convention. The district court in this case erred, therefore, in relying on the 1983 International Law Commission Report without reference to the ILC's 1991 decision to exclude inter-State disputes from the UN Convention. *See City of New York v. Permanent Mission of India*, 376 F. Supp. 2d 429, 434 (S.D.N.Y. 2005).

In sum, neither of the Conventions was meant to address tax disputes or abrogate sovereign immunity where such suits relate to real property in non-commercial use. This conclusion is bolstered by other evidence of international practice, such as the United Kingdom State Immunity Act of 1978 – a model followed by other commonwealth countrie s– which includes a broad immovable property exception similar to Article 9 of the European Convention and a separate, express carve-out from immunity for tax claims related to commercial use.

B. Even if the Conventions Governed Tax Disputes, the FSIA Exception Is Narrower

Even if the Conventions did apply to tax disputes, the United States is not a signatory to the Conventions, and the FSIA's immovable property exception is drafted more

narrowly, such that its scope must be understood differently. The FSIA exception applies only to cases "in which rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The European and UN Conventions, by contrast, respectively address "obligations arising out of [a Contracting State's] rights or interests in, or use or possession of, immovable property" or "any obligation of the state arising out of its interest in, or its possession or use of immovable property." By limiting the FSIA exception to "rights in immovable property," Congress ensured that it is a "relatively minor exception[] to immunity." *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1520 (D.C. Cir. 1984); *compare with* 28 U.S.C. § 1605(a)(2) (FSIA's broader commercial properties exception, abrogating immunity from actions "based upon a commercial activity"). This narrow exception is consistent with pre-FSIA doctrine, with which Congress intended to ensure consistency. *See, e.g., Restatement (2d) of Foreign Relations*, § 68, cmt. d ("The rule [exempting actions to "obtain possession of or establish a property interest in immovable property"] does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession").

Accordingly, even if the Court were to read the Conventions to abrogate immunity for claims based on property tax liens on non-commercial property, the Court should not interpret the FSIA's narrow immovable property exception as expansively as the exceptions in the Conventions.[2]

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[2] The Department of Justice filed an *amicus* brief in 1985 supporting rehearing *en banc* of the Third Circuit's decision in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 34-36

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C. The FSIA Precludes Grounding Jurisdiction on Unadjudicated Tax Liens

The Supreme Court has directed that foreign states are immune from jurisdiction unless an activity falls within one of the exceptions to immunity under the FSIA. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983). Because of the important purposes served by the doctrine of foreign sovereign immunity, including its reciprocal consequences for the United States government abroad, the FSIA's waivers of sovereign immunity must be narrowly construed.[3]

(3d Cir. 1985). In that brief, the Government argued that the immovable property exceptions of Section 1605(a)(4) and the Conventions were consistent. Upon further review, the Government has concluded that the brief erred with respect to the European Convention; as to the UN Convention, the Government did not have the benefit of subsequent developments, and the 1991 elimination of the "fiscal" article clarified that the UN Convention did not apply to tax disputes between states.

[3] Congress recently passed the Foreign Operations, Export Financing and Related Programs Appropriations Act ("FOAA") of 2006, which includes a provision requiring the Department of State to withhold an amount equal to 110 percent of "unpaid taxes and interest determined to be owed by a foreign country on real property in the District of Columbia or New York, New York in a court order or judgment against such country by a court. . . ." Pub. L. No. 108-447, § 543(a), (f), 118 Stat. 2809, 3011. This provision is not relevant here, as there is no evidence that Congress intended to revise the FSIA's jurisdictional limits when it created this potential penalty. Further, funds withheld from obligation under Section 543 of the FOAA are reprogrammed to provide assistance for programs and activities in other countries. *Id.* §543(b).

1. The Tax Lien Is a Back Door Means to Gain Jurisdiction Over a Tax Dispute

The district court's decision would permit New York to eliminate sovereign immunity over a claim that is, fundamentally, a tax dispute between India and Mongolia and New York. Although styled as a property dispute over a lien on real property, the true claim here is for unpaid back taxes on properties used to house diplomatic mission personnel. As New York concedes in its brief, this suit will require determination of "whether taxation was lawfully imposed on the premises." (Appellee's Br. 37).

New York could not have directly sued India and Mongolia for back taxes on diplomatic property, since the FSIA does not waive sovereign immunity for such claims. *See Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 11 (1st Cir. 2002) (no jurisdiction over suit for non-payment of rent or trespass, since "purely compensatory rights, without more, are insufficient to sustain jurisdiction under the immovable property exception"); *Reclamantes*, 735 F.2d at 1525 (no jurisdiction over compensation claims based on uncompensated taking of previously held land grant claims).[4] Further, because the properties on which

[4] The *Restatement (Third) of Foreign Relations Law* provides that the immovable property exception extends to "rights of ownership, possession, occupation, or use, as well as controversies concerning payment of rent, taxes, and other fees concerning" premises used or owned by the foreign sovereign. *See Restatement (Third)*, § 455, comment b (1987). This Court has directed courts to be "vigilant" when relying on the "controversial" *Restatement (Third)*. *U.S. v. Yousef*, 327 F.3d 56, 100 (2d Cir. 2003). Such vigilance is warranted here because, in 1976, when Congress passed the FSIA, the then-current version of the Restatement contained no mention of an exception to immunity for tax suits. *See Restatement (Second) of Foreign Relations Law*, § 68(b), comment d (1965) (exception applies to claims seeking to "establish a

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the taxes were levied are used by India and Mongolia for diplomatic purposes – to house diplomats and lower level personnel at their missions to the UN – the "commercial activities" exception does not apply. 28 U.S.C. § 1605(a)(2). Thus, the only possibly applicable exception to sovereign immunity is the immovable property exception, which waives immunity for disputes about "rights in property," not compensatory damages claims, such as for unpaid taxes.

Yet this suit requires the Court to decide whether India and Mongolia owe taxes, not whether they own or are entitled to possession of their properties. New York's tax lien arises by operation of statute, not as the result of an administrative process or court proceeding. N.Y.C. Admin. Code § 11-301. New York seeks a judgment pursuant to N.Y.C. Admin. Code section 11-338, which provides that "In an action to foreclose a tax lien, *unless the defendants obtain judgment*, the plaintiff shall be entitled to a judgment establishing the validity of the tax lien *so far as the same shall not be adjudged invalid . . .* " (emphasis added). Thus, to prevail on a claim to foreclose on a lien, New York must prove the validity of its tax claim. Here, however, India and Mongolia insist that the tax is invalid, and that no court has jurisdiction over them to adjudge

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property interest in immovable property;" no immunity for "actions for the determination of possession of, or an interest in, immovable or real property"). Thus, the *Restatement (Third)* overstates the scope of the immovable property exception to the extent it suggests that each type of controversy listed would independently support jurisdiction. *See Rodriguez*, 297 F.3d at 13 (immovable property exception does not apply to suit for breach of rent contract; rejecting plaintiff's reliance upon reference to "rent" in *Restatement (Third)* in support of contrary argument).

the tax valid. Thus, the City's complaint seeking a declaration of a valid tax lien requires the district court to decide the very question that it has no jurisdiction to hear – the validity of a claim for taxes against a foreign sovereign.

The district court's jurisdiction and defendants' sovereign immunity should not hinge on whether a tax dispute is styled as a suit for back taxes or a lien dispute. This Court has held that, to determine the scope of the waiver of U.S. sovereign immunity under the Federal Tort Claims Act, "a court must look, not to the theory upon which the plaintiff elects to proceed, but rather to the substance of the claim which he asserts." *Lambertson v. U.S.*, 528 F.2d 441, 443 (2d Cir. 1976). For example, where suits in battery are barred and suits in negligence are permitted, "to permit plaintiff to recover by 'dressing up the substance' of battery in the 'garments' of negligence would be to 'judicially admit at the back door that which has been legislatively turned away at the front door.'" *Id.* at 445 (citation omitted). This case presents the same type of incursion on sovereign immunity.

The district court dismissed the defendants' concern that the City used a tax lien to "bootstrap" an otherwise nonjusticiable claim into the immovable property exception, reasoning that here the tax liens "arise directly out of Defendants' ownership and use of real estate." *Permanent Mission of India*, 376 F. Supp. 2d at 438. This logic – which grounds jurisdiction not on the fact of a lien, but on the nexus of the lien to real property ownership – opens the door to a sweeping waiver of sovereign immunity. There are a multitude of liens that "arise directly out of Defendants' ownership and use of real estate." *Id.* New York City "has created several statutory liens in its favor against real property owned by persons subject to enforcement

action pursuant to various sections of the New York City Administrative Code." Melvyn Mitzner, Liens and Encumbrances, *Real Estate Titles*, 311 (James M. Pedowitz ed., 1984). These statutory City liens include, *inter alia*, the emergency repair lien, the relocation lien, the pest control lien, the housing violations and civil penalty lien, the canopy lien, the leaking tap lien, the building inspection fees lien, the sidewalk repair lien, and the environmental control board lien. *Id.* at 311-314. Many if not all of these liens are as closely associated with real property ownership as a tax lien.

Further, the district court's implication that the liens trigger the immovable property exception because they "arise directly out of" property ownership contradicts years of FSIA jurisprudence limiting the exception to suits directly about property ownership and use, not the effects of or obligations from such ownership. Contrary to the district court's suggestion, rent, zoning, and even tort disputes can easily be understood to "arise directly out of" the ownership and use of real property. For example, the Supreme Court has determined that zoning laws work to impose "additional restrictions in respect of the use and occupation of private lands." *Village of Euclid, Ohio v. Amber Realty*, 272 U.S. 365, 386-87 (1926). And as to tort suits "involving liability for injuries arising from conditions on property, the existence of a duty generally depends upon 'occupancy, ownership, control or a special use of [the] premises' by the defendant." *Sutera v. Go Jokir*, 86 F.3d 298, 302 (2d Cir. 1996) (citation omitted).

The courts, however, have consistently refused to extend jurisdiction to such claims under the immovable property exception. *See Rodriguez*, 297 F.3d at 13 (dispute over unpaid rent does not trigger immovable property

exception because exception limited to "cases in which rights of ownership, use or possession are at issue," not claims "somehow related to real property"); *City of Englewood*, 773 F.2d at 34-36 (no jurisdiction over suit seeking to execute on claimed lien for unpaid property taxes because the immovable property exception is a "title dispute exception" limited to disputes over title or possession of real property); *MacArthur Area Citizens Assoc. v. Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987), *modified on other grounds*, 823 F.2d 606 (D.C. Cir. 1987) (suit concerning conversion of property allegedly in violation of local zoning laws not within real property exception; exception "not intended broadly to abrogate immunity for any action touching upon real estate"); *Reclamantes*, 735 F.2d at 1524 (no jurisdiction over purely compensatory claim arising out of real property ownership).[5]

Thus, courts interpreting the FSIA immovable property exception have repeatedly rejected the idea that claims that "arise directly out of" property ownership trigger the exception. The district court erred when it grounded the abrogation of sovereign immunity on tax liens that allegedly arise out of the foreign sovereign's property ownership.[6]

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[5] In *Reclamantes*, then-Judge Scalia appeared to approve of a holding that plaintiffs triggered the immovable property exception when they amended their complaint for unpaid taxes by adding a request for declaratory judgment on a statutory tax lien. *See* 735 F.2d at 1522 (*citing County Board v. Govt of the German Dem. Rep.*, Civ. No. 78-293-A (E.D. Va. Sept. 6, 1978), *rev'd on other grounds, U.S. v. Arlington*, 702 F.2d 485 (4th Cir. 1983)). But this citation, which was in dictum and without explanation, provides little guidance here.

[6] In the amicus brief discussed *supra*, note 2, which unsuccessfully sought rehearing in *Englewood*, the Government argued that tax liens

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2. Grounding Jurisdiction on Liens Is Inconsistent with the FSIA's Anti-Attachment Provisions

The FSIA permits pre judgment attachment only on a sovereign's commercial property, after judicial action, where the sovereign has waived its immunity from pre judgment attachment, and where the attachment is "not to obtain jurisdiction." 28 U.S.C. § 1610(d)(2). Indeed, a crucial purpose of the FSIA was to end the practice of obtaining jurisdiction over foreign states by seizing their property. *See* H.R. Rep. 94-1487, 94th Cong., 2d Sess. (1976) at 26-27 ("[I]t should be pointed out that neither section 1610 nor 1611 would permit an attachment for the purpose of obtaining jurisdiction over a foreign state or its property. For this reason, section 1609 has the effect of precluding attachments as a means for commencing a lawsuit. . . . This shotgun approach has caused significant irritation to many foreign governments."); *Englewood*, 773 F.2d at 34 (FSIA directed at eliminating practice of seizing sovereigns' property in order to compel their appearance).[7]

Here, New York's liens are analogous to *de facto* attachments on sovereign property, used to obtain jurisdiction. The district court asserted jurisdiction on the ground that the tax liens were "rights in immovable property"

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implicated immovable property for purposes of the FSIA exception. That brief did not address all of the issues discussed herein, however, and, upon further review, the Government no longer subscribes to that position.

[7] In fact, the only FSIA provision pertaining to liens, the exception from jurisdictional immunity for a suit in admiralty brought to enforce a commercial maritime lien, converts the claim into an *in personam* action against the foreign state, and does not allow an arrest of the vessel. *See* 28 U.S.C. § 1605(b); H.R. Rep. 94-1487 at 21-22.

under the immovable property exception because liens "burden the land [and] in so doing, they directly affect the property owner's rights to alienate or convey the property." *Permanent Mission of India*, 376 F. Supp. 2d at 436. The district court reasoned that "a lien is a direct interference with property rights" and that the "presence of a tax lien means that the owner does not have the power to convey full rights and title to another purchaser, but that any subsequent purchaser would take the property subject to the lien." *Id.* Thus, according to the district court, it is the liens' ability to attach to and encumber defendants' property that triggers the immovable property exception and confers jurisdiction over India and Mongolia.

This ruling ignores the anti-attachment provisions of the FSIA, which bar the attachment of sovereign property as a basis for jurisdiction. Section 1610(d)(2) of the anti-attachment provisions would be seriously undermined if an unadjudicated statutory tax lien placed on non-commercial sovereign property could attach to such property and thereby confer jurisdiction over a dispute as to back taxes. At least one court has equated consent to a lien with a waiver of jurisdictional immunity, holding that a contractual provision agreeing to place a lien on sovereign commercially-used property "cannot be interpreted as granting anything other than consent to a pre judgment arrest and attachment" for FSIA purposes. *Enron Equipment Procurement Co. v. The M/V Titan 2*, 82 F. Supp.2d 602, 610 (W.D. La. 1999).[8]

[8] The anti-attachment provisions of the FSIA refer to "attachment arrest and execution." 28 U.S.C. § 1609. Section 1610(a) articulates the exceptions to the ban, including for "attachment in aid of execution" in prescribed circumstances; its legislative history provides that "the term

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Therefore, because the FSIA prohibits courts from using the attachment of non-commercial sovereign property as the basis for the court's jurisdiction, the City's statutory tax liens cannot trigger the immovable property exception.

3. Pre-FSIA Case Law Counsels Against Jurisdiction Over Tax Lien Suits

Our review of the few informative pre-FSIA cases indicates that pre-FSIA courts did not exercise jurisdiction over foreign sovereigns on the basis of tax liens on sovereign-owned properties, regardless of whether the underlying tax was valid. In *Republic of Argentina v. City of New York*, 25 N.Y. 252, 262, 303 N.Y.S.2d 644, 650 (N.Y. 1969), the Court of Appeals ruled:

> The corporation counsel contends . . . that its claims for unpaid taxes constitute a lien on the property. . . . The city, however, has no power to transform its tax claim into a lien. Just as it may not compel the payment of a

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'attachment in aid of execution' is intended to include attachments, garnishments and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment." H.R. Rep. 94-1487 at 28. As the *Enron* decision reflects, an unadjudicated lien, imposed for purposes of acquiring jurisdiction, is barred by these anti-attachment provisions. *Enron*, 82 F. Supp. 2d at 610; *see also Black's Law Dictionary*, 933 (7th ed. 1999) (defining lien as a "legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied."). And, whereas an "attachment in aid of execution" of a judgment would take place only after a court had adjudicated a matter and rendered a judgment, statutory liens are unadjudicated, and arise before judgment. *See* Mitzner, *Real Estate Titles* at 299-322 (detailing the process by which statutory liens are filed). Thus, statutory liens are *a fortiori* barred as a basis for jurisdiction by the FSIA's anti-attachment provisions, because they encumber property without court process.

> tax by proceeding directly against the plaintiff's property, its imposition of a lien, which would affect the property indirectly by reducing the sum it could realize on sale to a subsequent purchase, would constitute an impermissible exercise of jurisdiction over another state's property.

Although *Argentina* is of limited relevance since jurisdiction was not at issue (the sovereign paid the tax and submitted to jurisdiction by suing for a refund), it may provide guidance: the court ruled that "since a lien has an immediate adverse effect upon the amount which the government would receive on a sale, to sanction its imposition would constitute a direct interference with the property of a foreign state and, as such, would violate the principle of sovereign immunity." *Id.*

Similarly, in *New Rochelle v. Republic of Ghana*, the town sued to foreclose tax liens on parcels owned by foreign sovereigns (based on taxes of undisputed validity). 255 N.Y.S.2d 178, 179 (Ct. Court Westchester 1964). The Department of State asserted that New York courts lacked jurisdiction to foreclose the tax lien; the court held that it had jurisdiction, but that "the overwhelming weight of opinion holds that jurisdiction over proceedings such as these should not be exercised." *Id.* at 179-80.

Thus, the pre-FSIA cases, although grounded on different jurisdictional rules than those of the post-FSIA era, counsel against exercising jurisdiction over suits to enforce tax obligations through tax liens.

4. The FSIA's Legislative History Does Not Suggest Jurisdiction Over Tax Lien Suits

The district court concluded that the legislative history of the FSIA "suggests that Congress believed matters such as tax liens would lay within that exception." *Permanent Mission of India*, 376 F. Supp. 2d at 435 (*citing* H.R. Rep. 94-1487 at 20 (exception applies to "questions of ownership, rent, servitudes, and similar matters")). This interpretation of the legislative history is incorrect.

A tax lien is an interest that "substantially affect[s] the rights of property owners," *Zaccaro v. Cahill*, 100 N.Y.2d 884, 890, 768 N.Y.S.2d 730 (N.Y. 2003), and survives as a secured interest in the property even if the owner changes. But it differs from a servitude in meaningful ways. Disputes involving "ownership, rents, [and] servitudes" address the direct and immediate use and possession of property, and thus implicate the "peculiar, history, niceties, and complexities" of local real property law. *Permanent Mission of India*, 376 F. Supp. 2d at 434. Liens, by contrast, are an encumbrance imposed as security for monetary debt. *See, e.g.*, 11 U.S.C. § 101(37) (lien defined as a "charge against or interest in property to secure payment of a debt or performance of an obligation"); *Restatement of the Law on Property (First)*, § 540, cmt a ("the lien constitutes merely additional security for the performance of the promise"); *Restatement of the Law on Property (Third)*, § 8.3 (a "servitude may be enforced by any appropriate remedy or combination of remedies, which may include . . . imposition of liens.").

The distinction between liens and servitudes is significant to the interpretation of the immovable property exception. A lien holder's primary claim is to payment of a debt, whereas a person suing on a lease, for title, or on a

servitude is seeking an immediate interest in the property itself. Because the debts undergirding a lien may be of any variety, cases involving liens are unlikely to turn on the peculiarities and complexities of local property law, whereas "questions of ownership, rent, servitudes, and similar matters" always do. *Cf. Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262-263 (1999) (liens are merely a means to the end of satisfying a claim to recover money; they provide a substitute, compensatory remedy, not specific relief); *Weinstein v. Taylor*, 234 N.Y.S.2d 926, 929 (N.Y. Sup. Ct. 1962) (tax lien differs from estate or interest in real property). Thus, the rationale underlying the immovable property exception – that local jurisdictions should resolve local real property disputes – applies with much less force to liens than to servitudes, since liens generally cannot provide the "specific relief" of a direct claim to ownership or use of the property.

Accordingly, a single reference to servitudes in the legislative history of the FSIA does not suggest that the immovable property exception waives sovereign immunity from suits over tax liens.

II. Question Two

Considerations of diplomatic and foreign relations counsel in favor of a narrow reading of the immovable property exception to sovereign immunity, and against an assertion of jurisdiction over this dispute over taxes on diplomatic property.

If this Court upholds a finding of jurisdiction, there is concern that the U.N. diplomatic community would respond vigorously, perhaps asserting that the United States is failing to live up to its obligation to protect against

infringements of sovereign immunity, or arguing that international disputes over treaty obligations should not be resolved in the domestic courts of the host state. Asserting jurisdiction over a government-to-government tax dispute, where no commercial activity is involved and the rights asserted to be at issue would allegedly derive from the U.N. Headquarters Agreement, the U.N. General Convention on Privileges and Immunities, and the Vienna Convention on Diplomatic Relations, would be particularly controversial. Some countries might make an effort to refer the matter, through the U.N.'s Host Country Committee and the General Assembly, to the International Court of Justice. In short, a finding of jurisdiction here would permit a decision by New York City's taxing authorities to trigger a confrontation between the United States and the United Nations that could have serious implications for their diplomatic relationship.

Additionally, if New York can proceed with suits against foreign sovereigns for unpaid property taxes based on liens on their properties, there is a danger that those countries would respond in kind. Placing liens upon U.S.-owned real property abroad in order to permit local courts to assert jurisdiction, perhaps even in cases with an attenuated connection to the real property, would interfere with the operations of U.S. missions abroad. A judgment in favor of jurisdiction here would certainly hinder the United States in its efforts to assert sovereign immunity from taxes allegedly owed abroad, particularly if the tax claim is reduced to a lien.

Further, the State Department has advised that bilateral relations with one of the sovereign defendants have already been adversely affected by the suit and the district court's assertion of jurisdiction over this sovereign;

specifically, the sale of a major piece of U.S.-owned property has been blocked. This response is typical of the sorts of measures that can be expected in response to an assertion of jurisdiction, and will hamper the ability of U.S. missions abroad to buy, sell and construct diplomatic properties. *See* PL 109-108, Title IV (authorizing $600 million for the Diplomatic Security Construction Program and $900 million for worldwide security upgrades).

Accordingly, considerations of foreign policy, including concerns about engendering bilateral frictions, impeding U.S. mission operations abroad, and provoking reciprocal attempts at asserting jurisdiction over the United States, all counsel heavily in favor of a restrained reading of the immovable property exception to sovereign immunity.

* * *

We thank the Court for its consideration of these issues, and we respectfully request that this letter be docketed by the Clerk of the Court.

Respectfully submitted,

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March 16, 2006

Roseann B. MacKechnie, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Court House
40 Centre Street
New York, New York 10007

Re: *City of New York v. Permanent Mission of India, et al.*, 05-4260-cv(L), 05-4263-cv(CON)

To the Court:

This letter-brief is respectfully submitted by appellee the City of New York to address the response of the Justice Department, on behalf of the State Department ("State Department Response") to the Court's inquiry to the State Department of January 9, 2006.

1. Scope of Immovable Property Exception in International Conventions

Both the United Nations Convention on Jurisdictional Immunities of States and their Property ("U.N. Convention") and the European Convention on State Immunity ("European Convention") disallow claims of immunity not

only in actions concerning rights in immovable property, but also in actions concerning obligations arising out of the use of such property. As the State Department observes, those Conventions deal exclusively with relations between states and private persons or entities. *See, e.g.*, Explanatory Report to European Convention at ¶ 113, http://www.conventions.coe.int/Treaty/en/Treaties/Word/ 074.doc.

The Conventions are nonetheless relevant here, first, because they demonstrate the breadth of the immovable property exception to sovereign immunity as that exception was internationally recognized at and before the enactment of the FSIA in 1976. The Explanatory Report to the European Convention, which was opened to signature in 1972, provides, at ¶ 7: "By limiting the number of cases in which States can invoke jurisdictional immunity, the Convention is consistent with the trend taking place in the case-law and legal writings in the majority of countries." Both Conventions provide that a sovereign state has no immunity from suit by a private party when the suit relates to "any right or interest of the State in, or its possession or use of, . . . immovable property," or to any obligations arising out of such possession or use; both apply to proceedings relating to mortgages, whether the foreign state is mortgagor or mortgagee; and as to both, "[t]he expressions 'rights', 'use' and 'possession' must be interpreted broadly". Fifth Report on Jurisdictional Immunities of States and their Property, Yearbook of the International Law Commission ("ILC Yearbook"), 1983, vol. II(1), at 51; http://untreaty.un.org/ilc/guide/4_1.htm; *see also*, Explanatory Report on the European Convention, ¶¶ 114, 44.

Second, the record of the U.N. Convention makes clear that this case is governed by the Vienna Convention on

Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (1972), and the Vienna Convention on Consular Relations, 21 U.S.T. 77, Art. 32 (1969), both of which provide for local property taxation of the property at issue here. The Chairman of the Drafting Committee of the U.N. Convention stated that the issue of taxation was ultimately not addressed, not only because it concerned relations between states, but also because it was "governed by existing rules of international law and, as such, covered by the provisions of article 3, already adopted by the Commission." ILC Yearbook, 1991, v. I, at 84 ¶ 6. Article 3 states that the U.N. Convention defers to existing international law concerning the privileges and immunities of diplomatic missions and consular posts. As the Chairman further stated, the withdrawn taxation article "merely gave rise to problems of interpretation *vis-à-vis* the diplomatic and consular conventions." *Id.* Similarly, "[t]he exclusion of these matters from the field of application of the [European] Convention . . . means only that, since the provisions of the Convention may not be invoked, recourse must be had to general rules of law." Explanatory Report to European Convention at ¶ 114.

The Vienna Conventions exempt only the mission, the consulate, and the residences of the chief of mission and of the consul general, and not the staff housing at issue here. *Accord* N.Y. RPTL § 418; *see* Appellee's Brief at pp. 11-14. Consistent with the Vienna Conventions, the State Department itself has repeatedly stated that properties such as those at issue here are subject to local taxation (U.S. Department of State, Guidance for Administrative Officers § 7.8, January 4, 2004 [Joint Appendix pp. 200-201]; Diplomatic Note HC-18-93, April 14, 1993 [Joint Appendix pp. 210-211]; Diplomatic Note HC-06-93, February 17,

1993 [Joint Appendix pp. 203-205]; Diplomatic Note HC-12-01, April 5, 2001 [Joint Appendix pp. 215-216] [all advising UN missions of their obligations to pay local real property taxes on non-mission and non-head of mission residence property]; U.S. Department of State, Guidance for Administrative Officers § 7.8, January 4, 2004 [Joint Appendix pp. 200-201]; Diplomatic Note HC-18-93, April 14, 1993 [Joint Appendix pp. 210-211]; Diplomatic Note HC-06-93, February 17, 1993 [Joint Appendix pp. 203-205]; Diplomatic Note HC-12-01, April 5, 2001 [Joint Appendix pp. 215-216]). Moreover, the Congress has twice enacted legislation signaling its view that the subject matter is subject to the jurisdiction of the courts. Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 543(3) (2004); Foreign Operations, Export Financing and Related Programs Appropriation Act of 2006, Pub. L. No. 109-102, § 543(a),(f) (both Acts referring to "unpaid taxes and interest determined to be owed by a foreign country on real property in . . . New York, New York in a court order or judgment entered against such country by a court of the United States or any State or subdivision thereof").

2. Statutory Construction of the Foreign Sovereign Immunities Act ("FSIA")

The State Department provides opinions as to matters of statutory construction, as to which, as contrasted with "the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct," *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004), it "merit[s] no special deference" by the courts. Indeed, the Supreme Court in *Altmann* rejected a State Department recommendation "concern[ing] interpretation of the FSIA's reach – a 'pure question of statutory construction . . . well

within the province of the Judiciary.'" *Altmann*, 541 U.S. at 701.

The State Department's legal analysis is incorrect. It offhandedly disregards the only on-point appellate analysis of the issue, that of then-Judge Scalia in *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984). State Department Response, p. 6 n5. *Reclamantes* construed § 68(b) of the Restatement 2d of Foreign Relations as providing for jurisdiction in cases that fall within the local action rule, and specifically cited a case seeking a declaration of the validity of a tax lien. *See* Appellee's Brief at pp. 24-29; *Reclamantes*, 735 F.2d at 1522. *Reclamantes* states: "The immovable property exception was enacted to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice." *Id.* at 1521. The rationale recognized in *Reclamantes* – that the determination of rights in land is a fundamental attribute of local sovereignty – is the same as that provided by the drafters of the U.N. Convention. *Compare* 735 F.2d at 1521 *with* Fifth Report on Jurisdictional Immunities of States and Their Property, ILC Yearbook 1983, v. I1(1), at 46-48.

The State Department is incorrect in its assertion, at p. 6, that FSIA jurisprudence limits the immovable property exception to suits directly about ownership and use. Both before and after the enactment of the FSIA, U.S. courts have exercised jurisdiction over disputes involving rights in diplomatic immovable property, including tax lien and lease disputes. In *County Bd. v. Gov't of the German Democratic Republic*, 17 Int'l Legal Materials 104 (E.D. Va. 1978) (cited in *Reclamantes*, 735 F.2d at 1522), the Court found jurisdiction to adjudicate the validity of a property tax lien. In *York River House v. Pakistan Mission*

to the U.N., 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y. 1991) (Leval, J.), the Court held that the immovable property exception applied to a dispute concerning the right of a lessor to terminate a lease held by Pakistan's Mission to the U.N, although, as the court subsequently held, the lessor could not be evicted, pursuant to the Vienna Convention on Diplomatic Relations. *York River v. Pakistan*, 820 F. Supp. 760 (S.D.N.Y. 1993). In *Republic of Argentina v. City of New York*, 25 N.Y. 2d 252 (1969), the New York State Court of Appeals decided on the merits that the Argentine consulate was not subject to real property taxation. The decision was based largely on the Vienna Convention on Consular Relations, even though the United States had not yet ratified it. Moreover, as *Reclamantes*, 735 F.2d at 1521, enjoins, the FSIA exemption was grounded not solely in U.S. practice, but in "international practice," which by 1976 provided a broad exemption.

There is no basis in law for excluding liens, alone among interests in property, from the reach of the immovable property exception. *See* Appellee's Brief, at pp. 29-35. Unlike these actions to establish the validity of liens, the cases cited by the State Department, which concern zoning, tort liability arising out of conditions on property, public nuisance, and payment of back rent, are not "actions to establish a property interest in immovable property," Restatement 2d § 68(b). Therefore, there is no jurisdiction over such actions, either under the FSIA or under the local action rule.

The State Department Response, pp. 4-5, seeks to exclude tax lien cases from the exemption on the grounds that they are really about the validity of the taxes and about a money debt, not about ownership or possession. To

the contrary, the fact that a court, in the process of adjudicating the validity of real property tax liens, will necessarily render determinations concerning whether taxes are owed, does not alter the nature of the court proceeding or the substance of the claim asserted. It could just as well be argued that the dispute in *York River House* was really about whether the apartment was used as a primary residence within the meaning of the Rent Stabilization Law, or about the damages that were plaintiff's sole remedy, and that possession was merely a consequence. A case such as this, brought not to enforce but "to establish a property interest in immovable property," falls squarely within the exception as defined by the Restatement 2d and the FSIA. As the State Department's citations to the N.Y.C. Administrative Code liens demonstrate, local law, including local property law, is indeed paramount in such proceedings.

The exercise of jurisdiction here would not, as posited in the State Department Response, at p. 6, open "the door to a sweeping waiver of sovereign immunity" or expose foreign states to judicial enforcement of a multitude of allegedly frivolous interests. Tax liens, like all rights in immovable property, are created by the statutory or common law of the *situs*, and as such are subject to adjudication by the courts of the *situs*. *See* Appellee's Brief, pp. 29-33. Many of the City liens listed dismissively in the State Department Response, at p. 6, embody "payments for specific services rendered to a property," which foreign missions are specifically required to pay by the Vienna Diplomatic and Consular Conventions (Art. 23 & Art. 32, respectively), as the State Department has advised the missions. Diplomatic Note HC-18-93 (Joint Appendix pp. 206-213). Similarly, mechanic's liens would arise as a

result of failure to pay for work done on mission buildings, and provide a basis for suit both under the immovable property exception and the commercial activity exception of the FSIA. *See*, House Report, at 16 (1976 USCCAN, v. 5, at 6615). Judgment liens, of course, only arise where courts already have jurisdiction. Nor can it be said that the recognition of tax liens is comparable to the discredited practice of seizing and attaching property owned by foreign states solely to obtain personal jurisdiction over them, as was common before the FSIA created a mechanism to obtain *in personam* jurisdiction over foreign states. House Report, at 8 (1976 USCCAN v. 5, at 6606); *cf. Shaffer v. Heitner*, 433 U.S. 186 (1977).

These proceedings do not seek the seizure of property, and would not undermine the anti-attachment provisions of the FSIA, as argued in the State Department Response, pp. 7-8. By that logic, any action to recognize any rights in property would amount to a seizure, because it would, if successful, encumber the owner's rights. Whereas 28 U.S.C. § 1610 pertains to attachments, which are seizures, these proceedings seek only judgments as to the validity of liens. A tax lien cannot give rise to a pre-judgment seizure, and the City has recognized that even after judgment it cannot foreclose on the subject properties. It may be presumed that a state will honor the obligations embodied in the judgment of the Court. *See*, Testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice, Hearing on H.R. 3493 (June 7, 1973), at 24. Neither *Enron Equipment v. The M/V Titan 2*, 82 F.Supp. 2d 602, 610 (W.D. La. 1999), nor *Lambertson v. U.S.*, 528 F.2d 441 (2d Cir. 1976), dictate a contrary result. *Enron* addressed a contractual consent to pre-judgment arrest and attachment. In *Lambertson*, the plaintiff sought

to overcome an express exclusion of claims for assault and battery by dressing up his claim as one for negligence.

3. Diplomatic and Foreign Relations Considerations

The United States did not on its own initiative file a statement of interest pursuant to 28 U.S.C. § 517, as it might have done, but instead responded to questions posed by this Court after briefing by the parties. The State Department Response "counsel[s] in favor of a narrow" statutory construction of the immovable property exception to sovereign immunity, and against an assertion of jurisdiction over this dispute," citing the possibility of reciprocal actions against similarly-situated American property abroad, including an allegedly retaliatory blocking of a sale of United States-owned property by an unidentified one of the appellant governments. The possibility of resentment or unlawful retaliation against United States interests is, however, present when any judgment is entered in an American court against a foreign sovereign, however firmly grounded the exercise of jurisdiction. Declining to exercise jurisdiction on this basis, without more, could give any foreign state asserting sovereign immunity a veto power over American courts in the interpretation of FSIA.

Nor is such a threat logically related to the jurisdictional question. No execution against property is contemplated by the instant proceedings, and the taxation of property such as this has long been the settled policy of the United States. Acquiescing to the State Department recommendation would call into question the efforts of appellee to apply equity and consistency to the taxation of all non-exempt properties in its jurisdiction, including UN

missions and consulates that have, to date, been paying their real-property taxes. The State Department Response thus manifests precisely the impact of changeable diplomatic interests and pressures that the FSIA was enacted to prevent. As noted by the Supreme Court, "Congress passed the Foreign Sovereign Immunities Act in order to free the Government from . . . case-by-case diplomatic pressures, to clarify the governing standards, and to '[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process,' H. R. Rep. No. 94-1487, p. 7 (1976)." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). "The Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity, . . . and transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). As one court has observed, "the pre-1976 practice of courts reflexively deferring to the Executive Branch's immunity determinations has been eliminated." *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 624-625 (7th Cir. 2004).

The Supreme Court noted in *Altmann* that "should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy," on a case by case basis. *Republic of Austria v. Altmann*, 541 U.S. at 702. Nonetheless, it "express[ed] no opinion on the question whether . . . deference [to State Department expressions of opinion] should be granted in cases covered by the FSIA". *Id.* The Court similarly left the question open in matters governed by the Federal Tort

Claims Act. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004).

The question has since been addressed by both this Court (*Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d 57 [2d Cir. 2005]; *Abrams v. Societe Nationale des Chemins de Fer Francais*, 389 F.3d 61 [2d Cir. 2004] [dicta]), and by other Circuit Courts of Appeal. *Wei Ye v. Jiang Zemin*, 383 F.3d at 620 (dicta); *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005). As noted by those cases and *pre-Altmann* cases, *see, e.g., 767 Third Avenue Associates v. Consulate General of Socialist Federal Rep. of Yugoslavia*, 218 F. 3d 152, 160 (2d Cir. 2000), the applicable standard is that governing political questions, the accepted formulation of which was set out by the Supreme Court in *Baker v. Carr*,, 369 U.S. 186 (1962), which standard "reflects the judiciary's concerns regarding separation of powers". *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d at 72.

Baker noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211; *see, Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221, 229-230 (1986). "Not every case touching foreign relations is nonjusticiable." *Whiteman v. Dorotheum GmbH & Co KG*, 431 F.3d at 69, citing *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995); *see also, Planned Parenthood Fed'n of America, Inc. v. Agency for Int'l Development*, 838 F.2d 649, 655 (2nd Cir. 1988). As the First Circuit has observed, "For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones." *Ungar v. PLO*, 402 F.3d 274, 281 (1st Cir. 2005); *see also, Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione*, 937 F.2d 44, 49 (2d Cir. 1991).

Determining the amenability of a question to judicial resolution turns not on fear of or the likelihood of foreign repercussions, but requires a

> discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Baker v. Carr, 369 U.S. at 211-212. As noted by *Whiteman*, 431 F.3d at 71, *citing Baker*, 369 U.S. at 217:

> In pursuing a "case-by-case" inquiry under the political question doctrine, [the Court] has consistently employed one or more of the "six independent tests" identified by the Supreme Court in *Baker v. Carr*: [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Under the first three *Baker* tests, the parameters of the jurisdiction of the courts are not matters constitutionally committed to the Executive. Judicially discoverable and manageable standards exist in FSIA for resolving the

jurisdictional issue, and in the Conventions, *inter alia* for resolving the substantive issues. No policy determination not already embodied in positive law is thus required. *See, e.g. Kadic v. Karadzic*, 70 F.3d at 249; *Alperin v. Vatican Bank*, 410 F.3d 532, 555 (9th Cir. 2005) ("Deciding this sort of controversy is exactly what courts do"). It was therefore only by application of the remaining *Baker* tests that this Court in *Whiteman*, 431 F.3d at 59, and the D.C. Circuit in *Hwang Geum Joo*, 413 F.3d at 52, determined that the State Department's statements of "the expressed foreign policy interests of the United States" were entitled to deference.

Whiteman and *Hwang Geum Joo* sought redress for confiscations and atrocities made and committed before and during World War II. In *Whiteman*, the United States, by executive agreement, had joined in the establishment of an alternative international forum for the settlement of claims, as part of a settled policy, spanning two Presidential administrations, of "resolving Holocaust-era restitution claims through international agreements rather than litigation." *Whiteman*, 431 F.3d at 59. This Court therefore found that it could not "undertake independent resolution without expressing lack of the respect due" the Executive Branch because "the United States foreign policy advanced by the executive agreement [would be] substantially undermined by the continuing pendency of this case." *Id.* at 74. Similarly, in *Hwang Geum Joo*, the United States had pursued a "settled foreign policy of state-to-state negotiation with Japan," 413 F.3d at 52, to resolve war-related claims rather than permitting their resolution through private tort suits, *id.* at 50, and the Court determined that the lawsuit "would undo" that settled policy, and "disrupt Japan's 'delicate' relations with China and

Korea," thereby creating "serious implications for stability in the region." *Id.*

In the case at bar, in contrast, the United States has entered into no agreements either promising any nation immunity from civil jurisdiction beyond that recognized by FSIA or authorizing the resolution of disputes of this nature in any forum other than American courts. The State Department's own representations to appellants and other affected nations that they would be responsible for paying local property taxes on properties of the type involved in this suit indicate that an adjudication would not embarrass or demonstrate undue disrespect to a settled policy of a coordinate branch of government. It has been the settled policy of the United States, consistent with the Vienna Conventions, not to provide an exception to such property from local real property taxation. Moreover, as it concedes, the State Department has argued in the past for the exercise of jurisdiction in cases of this type. *See* State Department Response, p. 7n, conceding that it submitted an *amicus* brief in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (2d Cir., 1985), which "argued that tax liens implicated immovable property for purposes of the FSIA exception." Indeed, under the sixth *Baker* test, the greatest "potentiality of embarrassment from multifarious pronouncements by various departments on one question" would arise not from deference to the expressed views of the State Department here, but in acceding to them. As discussed *infra*, p. 4, the Congress has sought compliance with local judgments arising from the local real estate tax liabilities of United Nations missions.

Ultimately, the subject matter of these suits do not pertain to a question of foreign policy at all, but, because

they involve rights in real property located within the United States, to one of quintessentially local interest. Unlike this case, both *Whiteman* and *Hwang Geum Joo* concerned actions taken by foreign governments within their own territories. Unlike *Whiteman* and *Hwang Geum Joo*, this case concerns rights in immovable property forming part of a pre-existing and ongoing legal environment into which appellants have entered by purchasing, owning and using land in the United States, and as to which they have assumed responsibilities, subject to the limitations of international agreements, the parameters of which are appropriate to determination by local litigation. No countervailing interest has been identified that satisfies the relevant *Baker* tests so as to preclude the exercise of jurisdiction by the courts.

Respectfully submitted,

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Corporation Counsel of the
City of New York
Of counsel: Kristin Helmers
John Low-Beer
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By: /s/ _____
Norman Corenthal

To: John J.P. Howley, Esq.
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March 16, 2006

BY HAND DELIVERY

The Honorable Roseann B. MacKechnie, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: *City of New York v. Permanent Mission*,
05-4260-cv (L), 05-4263-cv (CON)

Dear Ms. MacKechnie:

We respectfully submit this letter on behalf of the Government of India and the Government of Mongolia in response to the February 23, 2006 letter-brief submitted by the Government of the United States in the above-captioned appeals. We enclose three additional copies of this letter for distribution to members of the panel (Katzmann, Hall, C.JJ., Korman, D.J.).

The Government of India and the Government of Mongolia agree with both the legal analysis set forth in the U.S. Government's letter-brief, and with its conclusion that these cases should be dismissed.

This Court posed two questions to the U.S. Government: one addressed to "considerations of diplomatic and

foreign relations"; and the other addressed to two international conventions, the United Nations Convention on Jurisdictional Immunities of States and Their Property, and the European Convention on State Immunity.

The U.S. Government has responded unequivocally that diplomatic and foreign relations concerns "counsel against an assertion of jurisdiction over this dispute," U.S. Gov't Lt. at 9, and that the language in the two conventions represents a departure from the language the U.S. Congress chose to use when it enacted the FSIA, *id.* at 3. The U.S. Government also notes that it has never become a signatory to either convention, and that the UN Convention has not yet entered into force. We note that the Government of India and the Government of Mongolia also are not signatories to either convention, and that the UN Convention has not yet entered into force because it has not yet been signed by the minimum number of States required.

The U.S. Government's views on the two questions presented are authoritative. Decisions concerning diplomatic and foreign relations are left solely to the federal government. The same is true for decisions whether or not to enter into international conventions. As the Supreme Court has repeatedly emphasized, "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes, the State of New York does not exist." *United States v. Pink*, 315 U.S. 203, 234 (1942); *see also Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal

power in the field affecting foreign relations be left entirely free from local interference.").

Accordingly, for all the reasons set forth in the U.S. Government's letter brief, and all the reasons set forth in the briefs and arguments submitted by the Government of India and the Government of Mongolia, we respectfully request reversal of the district court's orders in both cases and entry of judgments dismissing all claims in both complaints on the ground of sovereign immunity.

Respectfully submitted,

/s/ John J.P. Howley
John J.P. Howley

JJPH/nmf

cc: Norman Corenthal, Esq. (By Hand)
Nicole Gueron, Asst. U.S. Attorney (By Hand)

Certificate of Service

I hereby certify that I caused true and exact copies of the attached letter brief to be served by hand on Norman Corenthal, Esq., Senior Counsel, Appeals Division, The City of New York Law Department, 100 Church Street, New York, New York 10007, and on Nicole Gueron, Assistant United States Attorney, Southern District of New York, 86 Chambers Street, New York, New York 10007, on March 16, 2006.

Dated: New York, New York
March 16, 2006

/s/ John J.P. Howley
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March 23, 2006

BY HAND DELIVERY

The Honorable Roseann B. MacKechnie, Clerk
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: *City of New York v. Permanent Mission*,
05-4260-cv (L), 05-4263-cv (CON)

Dear Ms. MacKechnie:

We respectfully submit this reply letter on behalf of the Government of India and the Government of Mongolia in response to the March 16, 2006 letter submitted by the City of New York ("City Ltr.") in the above-captioned appeals. We enclose three additional copies of this letter for distribution to members of the panel (Katzmann, Hall, C.JJ., Korman, D.J.).

The City concedes that the UN and European Conventions "deal exclusively with relations between states and private persons." City Ltr. at 1. The U.S. Government agrees and adds that both conventions disclaim any application to tax disputes. Simply put, the U.S. Government and all parties to these appeals agree that the UN

and European Conventions do not apply to these tax disputes between a municipal government and two foreign nations.

The European Convention, however, is relevant to the Court's decision in these appeals because it demonstrates the distinctly different choice the U.S. Congress made when it enacted the Foreign Sovereign Immunities Act (FSIA).

I. The U.S. Congress Rejected the European Convention in Favor of a Narrower Exception When it Enacted the FSIA's "Rights in Immovable Property" Exception

The City asserts that the FSIA's "rights in immovable property exception" should be interpreted broadly to provide jurisdiction in these cases because the UN and European Conventions "disallow claims of immunity not only in actions concerning rights in immovable property, but also concerning obligations arising out of the use of such property." City Ltr. at 1. According to the City, the UN and European Conventions are relevant here because they are evidence of "the breadth of the immovable property exception to sovereign immunity as that exception was internationally recognized at and before enactment of the FSIA in 1976." City Ltr. at 2.

The language cited by the City has never been accepted as international law or practice. The U.S., India and Mongolia have never signed either convention. The UN Convention post-dates the FSIA by 28 years, and as of today has not been signed by a sufficient number of states to come into effect. And the European Convention has been open for signature for more than 33 years, yet only

eight of the 46 member states of the Council of Europe have signed it. Under these circumstances, the two conventions do not reflect international law or practice in 1976 or today.

More importantly, the legislative history of the FSIA reveals that Congress was well aware of the European Convention, and that it chose to copy some provisions of that convention but not others when it enacted the FSIA. For example, both the FSIA and the European Convention provide that a foreign state loses sovereign immunity for counterclaims "arising out of" the subject matter of the foreign state's claims. *Compare* 28 U.S.C. § 1607(b) (exception to sovereign immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state"), *with* European Convention, Art. 1(2)(a) (exception to sovereign immunity for counterclaims "arising out of the legal relationship or the facts on which the principal claim is based"). The legislative history of the FSIA explains that similar language is used in both the FSIA counterclaim exception and the European Convention counterclaim exception because FSIA Section 1607(b) is "based upon article I of the European Convention." H.R. Rep. 94-1487, 94th Cong., 2d Sess. (1976) at 23.

In stark contrast, the U.S. Congress chose not to use the European Convention's language when it enacted the "rights in immovable property" exception in FSIA Section 1605(a)(4). Unlike the European Convention's broad language extending its immovable property exception to all "obligations arising out of" immovable property, Congress chose to provide an exception only for cases in which "rights in immovable property" are "in issue." 28 U.S.C. § 1605(a)(4). The legislative history reveals that this far

more limited language in Section 1605(a)(4) was based not on the European Convention, but on the Tate Letter and the Vienna Convention on Diplomatic Relations. *See* H.R. Rep. 94-1487, at 20.

Where, as here, Congress chose to rely upon the European Convention's broad "arising out of" language in one section of the statute, but chose narrower "in issue" language in other parts of the same statute, the different language must be given different effect. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely."). Accordingly, the only guidance available from the European Convention's immovable property exception is that Congress intended a narrower exception when it enacted FSIA Section 1605(a)(4).

II. The U.S. Government's Position Here is Consistent with Judicial Precedent

The City argues that the U.S. Government's letter to the Court in these appeals is inconsistent with the decision in *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984), which the City asserts is "the only on-point appellate analysis of the issue." City Ltr. at 3. This argument ignores the fact that liens were not at issue in *Reclamantes*; the reference to liens in that case was pure *dicta*. The City's argument also ignores the Third Circuit's decision in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985). In that case, the Third Circuit held that a tax

lien does not support jurisdiction under the FSIA's rights in immovable property exception.

In its appellate brief, the City attempted to distinguish *City of Englewood* by arguing that it did not involve a dispute over a tax lien. City Br. at 40 ("Englewood addressed the validity of the assessment, and not the validity of the lien"). Now, in response to the U.S. Government's submission, the City concedes that *City of Englewood* did involve a dispute over whether "'tax liens implicated immovable property for purposes of the FSIA exception.'" City Ltr. at 9 (citation omitted).

The City asks this Court to reject the Third Circuit's holding in *City of Englewood* based on an unreported, district court decision, *County Board v. German Democratic Republic*, 17 Int'l Legal Materials 1404 (E.D. Va. 1978), where the court found jurisdiction under both the commercial activities exception and the rights in immovable property exception. As this Court has recognized, the existence of two alternative grounds renders the "holding" in that case of little precedential value. *See, e.g., United States v. Berlin*, 472 F.2d 1002, 1008 (2d Cir. 1973) (refusing to follow Third Circuit precedent, where basis for decision "constituted merely an alternate holding"); *Olin Corp. v. Insurance Co. of N. Am.*, 221 F.3d 307, 317 (2d Cir. 2000) (where state appellate court affirmed trial court on multiple grounds, "alternate holding" was of "limited precedential value"). The weakness of this unreported decision as precedent is magnified by the facts that (a) the jurisdictional decision was never appealed, (b) the Third Circuit ultimately rejected it in *City of Englewood*, and (c) the Fourth Circuit ultimately held that the GDR property was fully tax exempt in *United States v. County of Arlington*, 702 F.2d 485 (4th Cir. 1983).

The U.S. Government's position in this case is consistent with, and supported by, the Third Circuit's holding in *City of Englewood* that tax liens do not support jurisdiction under the FSIA's "rights in immovable property" exception.

III. The U.S. Government's Diplomatic and Foreign Relations Concerns

The City's arguments against deferring to the U.S. Government's views miss the point. This Court asked for the U.S. Government's foreign policy concerns and the U.S. Government responded unequivocally. Those foreign policy concerns are important to understand the practical implications of a decision in this case, which provides insight into the reasons for Congress' stated intent to have the FSIA provide a uniform definition of sovereign immunity and its exceptions.

Reciprocity is a fundamental principle of international law and diplomatic relations. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 221 (1895) ("in all questions of international law, reciprocity must be observed and maintained as a fundamental principle"); *Standt v. City of New York*, 153 F. Supp. 2d 417, 427 (S.D.N.Y. 2001) ("Reciprocity is the foundation of international law."). Whatever rules are established by a decision in this case for foreign government-owned property in the United States will likely apply to U.S. Government-owned property in foreign countries. *Boos v. Barry*, 485 U.S. 312, 323-324 (1988) ("the concept of reciprocity that governs much of international law . . . ensures that similar protections will be accorded those that we send abroad to represent the

United States . . . mak[ing] our national interest in protecting [foreign] diplomatic personnel powerful indeed").

The U.S. Department of State operates 272 embassies, consulates, and diplomatic missions in 166 countries. *See* http://usembassy.state.gov. If the City's interpretation of the "rights in immovable property" exception were applied reciprocally against the U.S. Government in foreign countries, then the scope of the U.S. Government's immunity from suit in foreign countries would be determined by the vagaries of local lien laws in several hundred municipalities around the world.

Contrary to the City's suggestion, this is not a matter of retaliation. This is a result of the reciprocal nature of international law and practice. Congress clearly did not intend that the scope of sovereign immunity for the United States would he determined by local lien laws in 272 foreign cities, nor did it intend for sovereign immunity to be applied differently in different parts of this country based on state or local lien laws. To the contrary, Congress expressly stated its intent to ensure uniform application of sovereign immunity exceptions based on a single, unified federal law. *See* H.R. Rep. 94-1487, at 13 ("jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences").

The City's only response is that "many" liens created by state and local laws may be adjudicated under other provisions of the FSIA. City Ltr. at 5. Thus, the City argues that jurisdiction exists under the commercial activities exception for mechanic's liens arising from the failure to pay for work done on mission premises. Similarly, the City

argues that judgement liens "arise only where courts already have jurisdiction." This argument only serves to highlight the fact that the "rights in immovable property" exception is not needed to provide a forum for legitimate claims against a foreign sovereign. Where the City can demonstrate commercial activity, jurisdiction exists under the commercial activities exception. But where, as here, the property is used solely for governmental or diplomatic purposes, the City cannot use a lien to create jurisdiction where none exists.

IV. The Vienna Conventions Do Not Support the City's Arguments

The City argues that the "rights in immovable property" exception should be interpreted broadly to allow jurisdiction based on a tax lien because, according to the City, "the Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 . . . and the Vienna Convention on Consular Relations, 21 U.S.T. 77 . . . provide for local property taxation of the property at issue here." City Ltr. at 2. This argument ignores substantial precedent in U.S. courts rejecting the City's interpretation of the two Vienna Conventions.

In *United States v. County of Arlington*, 702 F.2d 485 (4th Cir. 1983), a local government sought to impose real property taxes on an apartment building owned by the German Democratic Republic and used to house its diplomatic staff. *Id.* at 486. In a statement supporting the GDR's position, the U.S. Government advised the Court "that State practice under the 1961 Vienna Convention on Diplomatic Relations . . . has become so firmly and uniformly established in exempting such property that the

continued refusal to ensure comparable treatment in the United States would violate international law." *Id.* at 489 n.9. The Fourth Circuit agreed and, adopting the U.S. Government's position, affirmed dismissal of the tax claim on the ground that housing for diplomatic staff is exempt from all real property taxation under the Vienna Convention on Diplomatic Relations. *Id.* at 490.

The Vienna Convention on Consular Relations provides a similar tax exemption. In *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 (1969) (Fuld, C.J.), the City argued that consular offices were not tax exempt because international law provided tax exemptions only for diplomatic missions and the residence of the head of mission. *Id.* at 263-64. Chief Judge Fuld, writing for a unanimous court, rejected the City's argument and held that the Vienna Convention on Consular Relations did not limit tax exemptions to property "used for a 'diplomatic' purpose", but that all foreign government owned property was tax exempt so long as it "is used for a 'public' or 'governmental' purpose." *Id.* at 265.

In its appellate brief in this case, the City attempted to distinguish *Argentina* by arguing that it was based on "customary international law before ratification of the Vienna Convention." City Br. at 23. In its latest letter to the Court, however, the City now concedes that the *Argentina* decision was "based largely on the Vienna Convention on Consular Relations." City Ltr. at 4. This admission, together with the holdings in *Arlington* and *Argentina*, leave little doubt that both the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations provide full tax exemptions for real property used for a governmental purpose, including for the purpose of housing diplomatic staff.

For all the foregoing reasons, and for the reasons set forth in the U.S. Government's letter and the appellants' briefs, we respectfully request reversal of the district court's order and entry of judgments dismissing both actions on the ground of sovereign immunity.

Respectfully submitted,

/s/ John J.P. Howley
John J.P. Howley

cc: Norman Corenthal, Esq.
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Certificate of Service

I hereby certify that I caused true and exact copies of the attached letter brief to be served by hand on Norman Corenthal, Esq., Senior Counsel, Appeals Division, The City of New York, Law Department, 100 Church Street, New York, New York 10007, and on Nicole Gueron, Assistant United States Attorney, Southern District of New York, 86 Chambers Street, New York, New York 10007, on March 23, 2006.

Dated: New York, New York
March 23, 2006

/s/ John J.P. Howley
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(2)

Supreme Court, U.S.
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No. 06-134

In the
Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS AND THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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August 23, 2006

QUESTION PRESENTED

Does the exception to sovereign immunity for cases "in which rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality's lawsuit seeking to declare the validity of a tax lien placed upon real property owned by a foreign sovereign?

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The decision of the United States Court of Appeals for the Second Circuit is reported sub nom. City of New York v. Permanent Mission of India to the UN at 446 F.3d 365 (2d Cir. 2006) and is reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 1 to App. 24.

The memorandum and order of the United States District Court for the Southern District of New York is reported sub nom. City of New York v. Permanent Mission of India to the UN at 376 F.Supp. 2d 429 (S.D.N.Y. 2005), and is also reproduced in the Appendix to the Petition for Writ of Certiorari at pages App. 25 to App. 45.

STATEMENT OF THE CASE

Petitioners each own and operate multi-storey properties in midtown Manhattan, in New York City. The upper twenty floors of India's building are devoted exclusively to housing for staff of India's Permanent Mission to the United Nations, and of the Indian consulate in New York, below the level of head of mission, and their families. The top three floors of Mongolia's building are devoted exclusively to housing for staff of Mongolia's Permanent Mission to the United Nations, below the level of head of mission, and their families.[1] The City of New York ("the City") has assessed real property taxes on these portions of the property, since 1981 as to Mongolia's building, and since 1991, as to India's building, which taxes have not been paid. The total arrearage continues to grow through the imposition of interest charges and additional yearly tax assessments. As a result, by operation of law, the City holds a tax lien covering both properties.[2]

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[1] The remaining floors of each building, which floors are not the subject of this case, are used as offices of petitioners' United Nations missions, and in Mongolia's case, as the ambassador's residence.

[2] Real property tax liens arise as a matter of law in New York City, pursuant to NYC Administrative Code § 11-301 and New York Real Property Tax Law § 102(21), when municipal real property taxes are unpaid. Such liens encumber the property until they are paid, NYC Administrative Code § 11-301, and may be sold or assigned. NYC Administrative Code §§ 11-301 to 11-329, 11-332, 11-333.

The City commenced actions against the petitioners pursuant to New York City Administrative Code Title 11,[3] seeking to obtain declarations of the validity of the liens and to embody them in judgments, although not to foreclose against the present owners.[4] The action asserted that petitioners are not immune from liability for the taxes, charges and interest forming the subject-matter of the lien under local, state, federal or international law,[5] and that

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[3] The New York City Administrative Code authorizes a proceeding to reduce tax liens to judgment after they are outstanding for one year. NYC Administrative Code §§ 11-354, 11-335.

[4] The potential for execution under any judgment ultimately rendered in the proceedings is not implicated, since the City has represented in the suit that it is seeking only a judgment establishing the validity of the existing tax liens, and not execution upon the property.

[5] The Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (1972), and the Vienna Convention on Consular Relations, 21 U.S.T. 77, Art. 32 (1969), exempt from real property taxation only so much of foreign-owned real property as is used exclusively for the purposes of maintaining the offices of a United Nations mission or consulate, or the residence of a head of mission. New York State's Real Property Tax Law § 418(1) follows the same formula. Similarly, the State Department has informed foreign governments that "[a]bsent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations, except . . . for career heads of the consular posts or chiefs of missions to the international organizations." U.S. Department of State, Guidance for Administrative Officers § 7.8, January 4, 2004. See also, U.S. Department of State, Diplomatic Note HC-18-93, April 14, 1993; U.S. Department of State, Diplomatic Note HC-06-93, February 17, 1993; U.S. Department of State, Diplomatic Note HC-12-01, April 5, 2001. The State Department's Guidance, at § 7.8, suggests that a broader exception for premises used to house all diplomatic staff is applicable only to embassies and consulates within the Washington, D.C. metropolitan area, subject to reciprocal treatment of similar United States-owned property abroad.

jurisdiction is appropriate under the Foreign Sovereign Immunities Act of 1976 ("the FSIA"), 28 U.S.C. §§ 1602 through 1611. At 28 U.S.C. § 1605(a)(4), the FSIA exempts from the jurisdictional immunity of a foreign state cases "in which . . . rights in immovable property situated in the United States are in issue." At 28 U.S.C. § 1605(a)(2), the FSIA exempts from such immunity those actions that are "based upon a commercial activity carried on in the United States by the foreign state."

The cases were removed by petitioners to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441(d). Petitioners then moved to dismiss the complaints for lack of subject matter jurisdiction, upon the ground of immunity from suit under § 1604 of the FSIA. The District Court held that it had jurisdiction under the FSIA's immovable property exception, basing its conclusion upon "[t]he international practice that the immovable-property exception codifies and the legislative history of the FSIA," and on the fact that "the tax liens place [petitioners'] and the City's rights in the properties in issue." App. 44, 376 F.Supp.2d at 439. The District Court relied heavily upon the decision of Scalia, J., in Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984), which noted that the FSIA's enactment codified the restrictive view of foreign sovereign immunity, and that the FSIA's immovable property exception recognized "what is understood in domestic property jurisprudence to be the 'local-action rule'" requiring that the determination of rights in real property be judicially determined by the jurisdiction in which it is sited. Id. at 1521. The District Court did not reach the merits of the commercial activity argument, and it emphasized that its decision addressed the jurisdictional

threshold and not the substantive issue of whether the properties are exempt from tax liability. App. 44-45, 376 F.Supp.2d at 439. This interlocutory appeal ensued.

The Court of Appeals for the Second Circuit unanimously affirmed, holding that the immovable property exception of the FSIA confers jurisdiction because "[w]hat is in dispute in this case is the extent of defendants' obligations under local law (here, property taxes) arising directly out of their ownership of real property in the United States." App. 21, 446 F.3d at 376. Although the City had emphasized, and continues to emphasize, that the rights in issue were embodied in a lien upon the property, the Court held that the right to tax, itself, is a right in immovable property that provides a permissible basis for jurisdiction, and that the Court "would reach the same result had this action been filed purely to obtain a declaratory judgment" regarding the taxable status of the properties. App. 21 n.16, 446 F.3d at 376 n.15. Like the District Court, the Court of Appeals did not reach the commercial activity exception, although the City had emphasized, and continues to emphasize, its applicability as an alternative ground for jurisdiction.[6]

The Court rejected petitioners' argument "that the immovable property exception is limited to cases in which the parties dispute title, ownership or possession of the

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[6] The Court, however, noted that as an owner of real estate, a foreign government was acting in a private rather than in a sovereign capacity. App. 9, 446 F.3d at 370, citing Republic of Argentina v. Weltover, 504 U.S. 607, 612, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992). This is the analytical framework of the commercial activity exception, under which the private acts of a foreign sovereign are not immune.

immovable property itself," App. 7, 446 F.3d at 369. It concluded that the exception should be construed to include any case involving the foreign country's obligations arising directly out of the use of property situated in the United States, in addition to their rights to, interest in, use or possession of such property, App. 17-18, 446 F.3d at 374. Such obligations, the Court noted, are "simply the flip side" of the City's rights in the property, and the provision is not restricted, as petitioners argued, to "cases where the foreign government's rights in the property are in issue." App. 8, 446 F. 3d at 369.

The Court based its conclusion upon the plain language of 28 U.S.C. § 1605(a)(4), which does not limit itself to rights of possession or ownership. App. 8, 446 F. 3d at 369. The Court noted, as did the District Court, that "[o]wnership of property connotes a bundle of related rights and obligations defined by local property law. A foreign state cannot assume the benefits of ownership . . . while simultaneously disclaiming the obligations associated with them." App. 16, 446 F.3d at 374. The Court further noted that "at the time that the FSIA was enacted, the New York legislation at issue in this case was already in place," and that, as disclosed by such case law as Republic of Argentina v. City of New York, 25 N.Y.2d 252, 250 N.E.2d 698, 303 N.Y.S.2d 644 (1969), "courts had jurisdiction to hear disputes such as this one." App. 17 n.12, 446 F.3d at 374 n.11.

The Court, as had this Court in Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992), and the District of Columbia Circuit in Reclamantes, 735 F.2d at 1521, also

examined the FSIA's legislative history,[7] which made clear that "Congress's intent in enacting the FSIA was to largely codify the restrictive theory of sovereign immunity," which accords immunity "only where a state is acting in a sovereign capacity." App. 9, 446 F.3d at 370. The Court further noted that the "ownership of real estate in a foreign country . . . is not inherently a sovereign act." The Court observed that "the FSIA was intended . . . to bring the United States into conformity with other countries that had already adopted or were in the process of adopting the restrictive theory." App. 12, 446 F.3d at 371.

Before reaching its decision, the Court of Appeals requested the views of the Department of State on whether or not the immovable property exception "should be interpreted to accord with the more detailed version of this provision found in . . . the United Nations Convention on Jurisdictional Immunities of States and their Property, [and . . .] the European Convention on State Immunity," and asked whether "any considerations of diplomatic and foreign relations counsel a relatively narrow or expansive reading of this exception." App. 56-57. The Department of Justice, writing on behalf of the State Department, argued in favor of a narrow interpretation of the immovable property exception, so as to preclude jurisdiction in this case. App. 57-73. It advised that a decision upholding jurisdiction would be controversial within the diplomatic community, that it might result in interference with the operations of United States missions abroad, and that the pendency of the suit had already adversely affected

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[7] H.R. Rep. No. 1487at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6605.

bilateral relations with an unspecified one of the petitioner governments. App. 74-75. The Court of Appeals "carefully considered . . . the United States' arguments sounding in public policy" and was "not persuaded." App. 21, 446 F.3d at 377. The Court also "looked carefully at the United States' brief statement of potential foreign policy concerns, and found them "not presently to justify a dismissal on foreign policy grounds." App 22 n.17, 446 F.3d at 377 n.16.

REASONS FOR DENYING THE WRIT

I. There Is No Significant Conflict Between the Circuits. The Second Circuit's Decision Was Consistent With And Built Upon Other Case Law. The Only Apparently Inconsistent Decision Is Twenty-One Years Old And Represents Nothing More Than A Transitional and Superficial Split Between the Circuits.

Looking at the relevant decisions of other circuit Courts of Appeal, the Second Circuit noted that its holding was "entirely consistent with" the District of Columbia Circuit's decision in Asociacion de Reclamantes v. United Mexican States, 735 F.2d at 1517, and "indeed builds upon the groundwork it laid." App. 20, 446 F.3d at 375. The Second Circuit concurred, as well, with "the methodology [Reclamantes] employed (looking at international practice around the time of the FSIA's enactment)." Id. The Reclamantes Court rejected a claim by the successors in

interest to the recipients of land grants from Mexico who were driven from their land in the period following the Mexican War, and who claimed that Mexico had assumed the responsibility for compensating them for their lost land but had not done so. Reclamantes concluded, as did the Second Circuit here, that the immovable property exception was enacted to codify a real property exception to sovereign immunity recognized by international practice.

Reclamantes held that the claims involved there were not "property interests in real estate, such as a leasehold, easement or servitude, nor possessory rights, nor even rights to payment of money secured by an interest in land," 735 F.2d at 1523, and that the involvement of real property in the suit was "purely of historical interest, having no bearing upon present property interests." Id. In so holding, Reclamantes placed "rights to payment of money secured by an interest in land" among those rights that fall within the FSIA's definition of rights in immovable property. Id. Reclamantes cited with approval County Board v. Government of the German Democratic Republic, Civil No. 78-293-A (E.D. Va. Sept. 6, 1978) (reprinted in 17 Int'l Legal Materials 1404 (1978)), in which a county taxing authority sued a foreign sovereign for delinquent real estate taxes, including, as in this case, a "prayer for declaratory judgment that the property in question was subject to the state's statutory tax lien in favor of the county." See, 735 F.2d at 1522. The District Court there held that there was jurisdiction to entertain the suit under § 1605(a)(4) of the FSIA.[8]

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[8] Following rendition of a judgment in favor of the County in County Board, the Attorney General, at the request of the Department of State,

Like the District Court here, the Reclamantes court observed that the same considerations that produced the real property exception also underlie the local action rule, which doctrines "are obviously complementary, since the local action rule without the real property exception to sovereign immunity would mean that real property disputes involving foreign sovereigns could not be resolved in any court." Id. at 1521-1522.[9]

The Second Circuit here also noted that its holding was not inconsistent with other decisions which denied jurisdiction under the immovable property exception, because those disputes "did not directly implicate present real property interests because the plaintiffs sought only money damages and not any adjudication of property rights." App. 19n, 446 F.3d at 376n.[10]

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filed another action, which was not challenged under the FSIA, seeking a declaratory judgment that the property was exempt from county tax and seeking an injunction prohibiting further attempts to collect such taxes. In that action, the subject tax assessments were held violative of bilateral international agreements and of customary international law as it applied to the metropolitan area surrounding the nation's capital. United States v. County of Arlington, 669 F.2d 925, 928 (4th Cir. 1982), cert. denied sub nom. County of Arlington v. United States, 459 U.S. 801, 103 S. Ct. 23, 74 L. Ed. 2d 39 (1982), appeal after remand sub nom. United States v. County of Arlington, 702 F.2d 485 (4th Cir. 1983).

[9] In New York, as elsewhere, actions involving liens are subject to the local action rule. See, e.g., J. V. Dempsey, Lien as Estate or Interest in Land Within Venue Statute, 2 A.L.R.2d 1261 (1948)

[10] MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918 (D.C. Cir. 1987); and Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002).

The Court found "unpersuasive," App. 20n-21n, 446 F.3d at 376 n.14, the only apparently contrary decision, that of the Third Circuit Court of Appeals in City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31 (3d Cir. 1985), though it characterized the case as a denial of jurisdiction upon apparently similar facts. Upon closer examination, Englewood does not present a deep or meaningful split between the circuits.

The Third Circuit in Englewood only briefly and parenthetically discussed the immovable-property exception to immunity from suit under 1605(a)(4) of the FSIA. Citing Reclamantes, and no other authority, for a proposition that Reclamantes does not support, the Third Circuit characterized the exception as probably having been intended to apply only to title disputes. Accordingly, the Court stated that the immovable property exception "does not apply," 773 F.2d at 36.

Englewood was decided in 1985, one year after Reclamantes, within ten years of enactment of the FSIA, and over twenty years before this decision. In the interim, international jurisdictional norms have evolved, both through the preparation of draft conventions, and through ongoing interactions between local taxing authorities, the United States, and the United Nations and diplomatic communities.[11] This decision and Reclamantes represent a rational continuum, as the Second Circuit noted, and Englewood is not likely to be followed, even within the Third Circuit.

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[11] See footnote 5, infra.

In Englewood, "[t]he dispute giving rise to the . . . litigation [arose] out of efforts of the City of Englewood, New Jersey, to tax a parcel of improved real estate purchased by Libya as a residence for its Head of Mission to the United Nations." 773 F.2d at 32. When the City of Englewood sought a tax increase in the state tax court, Libya sought an exemption from taxation, and the proceeding was removed to the federal courts.[12] The decision in Englewood considered the immunity of Libya's property from execution under 28 U.S.C. §§ 1609 and 1610(a)(4)(B),[13] which it characterized as "substantially

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[12] The Third Circuit noted that, rather than dealing with the matter under the FSIA's immovable property exception, and "[r]ecognizing . . . that New Jersey law makes no provision for in personam enforcement of liability for real estate taxation, the [District C]ourt turned to the more practical consideration of whether Englewood could execute against the property in an in rem foreclosure of the claimed lien of its tax assessment." Englewood, 773 F.2d at 34. The District Court held that since the property was used as only a part-time weekend retreat and was not the primary residence of the head of mission, and because it was used for a commercial activity, it was subject to attachment and execution under 28 U.S.C. §§ 1609 and 1610(a)(4)(B). Id. The decision that was presented for review in Englewood, therefore, was not premised on the FSIA's exceptions to immunity from suit.

[13] Although the Second Circuit here chose not to distinguish Englewood, the different state tax and lien laws governing in Englewood and in this litigation are significant in placing the two litigations in context, as the City argued in the Second Circuit. See, City's Second Circuit Brief at p. 39. Under New Jersey law, no judicial action is necessary as a precondition to forcing a sale of real property for failure to satisfy a tax lien. New Jersey Stat. § 54:5-19 provides: "When unpaid taxes or any municipal lien, or part thereof, on real property, remains in arrears on the 11th day of the eleventh month in the fiscal year when the same became in arrears, the collector or other officer charged by law in the municipality with that duty, shall . . . enforce the lien by selling the property . . . ." In contrast, the New York City Administrative Code, at §§ 11-354 and 11-335, requires judicial authorization for enforcement through execution upon the property.

parallel" to the sections of the FSIA pertaining to "the general rule of immunity from personal jurisdiction." 773 F.2d at 35. It stated that "[t]he case for an exception, either to section 1604 or to section 1609 turns . . . on whether," as the District Court had held, Libya was engaging in a "commercial activity," 773 F.2d at 36, rather than on the immovable property exception.[14]

Given the brevity, superficiality and vintage of the Third Circuit's discussion, the District Court in this case was correct in noting that "[i]n light of the treatment of the immovable-property exception in Englewood, that case does not offer . . . adequate support to overcome the authority bolstering the City's position." App. 41, 376 F. Supp. 2d at 438. In the case's current posture, it similarly does not present a cognizable conflict between circuits, and thus presents an insufficient basis for review.

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[14] The Third Circuit rejected the District Court's reasoning that the commercial activity exception applied "because the property was acquired by Libya in a commercial transaction between a seller and a buyer," noting that "[t]he only purpose Libya has in holding the property . . . is for use by the Chief of its Mission to the United Nations," which it held to be "activity directly related to the purposes of the mission, and as a matter of law such use is not commercial activity." 773 F.2d at 37.

II. The Court of Appeals Correctly Relied Upon The Language Of The Statute And Its Legislative History To Determine That The Dispute Before The Court Came Within The FSIA's Immovable Property Exception. Petitioners Are Mistaken In Their Characterization Of The Court's Discussion Of International Conventions.

Petitioners take issue with the Second Circuit's conclusion that a dispute concerning the validity of tax liens puts a right in immovable property in issue, and they attack the Court's discussion of international conventions that were adopted or drafted roughly contemporaneously with the enactment of FSIA as an improper basis for the Court's decision. Neither issue provides an appropriate ground for review.

The Court of Appeals did not, as petitioners urge, act improperly in rejecting petitioners' argument that "rights in immovable property" should be read to exclude tax liens. Its analysis began, correctly, with the language of the statute, which, on its face, includes any dispute that directly involves any recognized legal right in immovable property, without being limited to rights to title, possession, use or servitudes.[15] The Court noted that the legislative history is to the same effect.[16] The Court did not, as

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[15] As with any question of statutory interpretation, the language of the statute is paramount, see, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450, 151 L. Ed. 2d 908, 122 S. Ct. 941 (2002).

[16] As stated by the House Report, even as to "property . . . used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission" (H.R. rep. No. 94-1487 at 20, reprinted at 1976 U.S.C.C.A.N. at 6619): "Actions short of attachment

petitioners argue, ignore a purported distinction between rights and security interests in real property. It found such distinctions irrelevant, first, because the taxability of the property itself is a right that brings the subject matter of the dispute within the exception from sovereign immunity, and, second, as the City emphasized, and continues to emphasize, because a tax lien upon real property is a right in immovable property which is carved out of, encumbers and diminishes the right of the fee holder, and a judgment on the merits in the instant proceeding will either sustain or extinguish the right that is embodied in the lien.[17]

Although petitioners may be correct in asserting that prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax dispute, see Petition for Certiorari, at pp. 14-15. this proposition is of no significance, because it is also true that no court during that

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or execution seem to be permitted under the [Vienna] Convention, and a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and other similar matters, as long as the foreign state's possession of the premises is not disturbed."

[17] Under New York Real Property Tax Law § 102(21), real property tax liens are encumbrances upon real property, which in turn are rights in property, Warren's Weed New York Real Property, at § 91.30. They are perpetual in duration, L. K. Land Corp. v. Gordon, 1 N.Y.2d 465, 136 N.E.2d 500, 154 N.Y.S.2d 463 (1955), and continue to encumber the property until they are paid. They run with the land. New York City Charter § 1519(2). They may be sold or assigned. NYC Administrative Code §§ 11-301 to 11-329, 11-332, 11-333. Such sales and assignments are defined as conveyances and are required to be recorded as such. NYC Administrative Code § 11-330. Conveyances are further defined as transfers of an "interest in real property." New York Real Property Law § 240(2). If not discharged, the liens will reduce the value of a property and will ultimately serve to divest the eventual non-diplomatic title-holder of both title and possession. See, NYC Administrative Code § 11-301.

period declined to exercise such jurisdiction. However, in 1978, two years after enactment of the FSIA, the court in County Board v. German Democratic Republic, 17 Intl Legal Materials 1404, did exercise jurisdiction.[18]

Once the Court of Appeals concluded from the legislative history of the FSIA that the statute "was intended . . . to bring the United States into conformity with other countries that had already adopted or were in the process of adopting the restrictive theory," the Court "look[ed] at contemporaneous expressions of the content of this exception to sovereign immunity for actions involving real property owned by the foreign state." App. 12, 446 F.3d at 371. In so doing, it followed the statement of Reclamantes that "the immovable property exception was enacted to codify . . . the pre-existing . . . exception . . . recognized by international practice." Reclamantes, 735 F.2d at 1521. These included Restatement (Second) of Foreign Relations Law of the United States § 68(b) (1965) (also relied on by Reclamantes, 735 F.2d at 1521), and the European Convention on State Immunity, May 16, 1972, ETS No. 74, "which was drafted in 1972 and ratified in 1976, just prior to the enactment of the FSIA." App. 13, 446 F.3d at 371-372. In order to further clarify the general level of acceptance of the restrictive theory of sovereign immunity as applied to the law of real property at the time

[18] No appeal was taken from that decision. See also York River House v. Pakistan Mission to the U.N., 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y. 1991) (Leval, J.) (applying immovable property exception to plaintiff's lease dispute with Pakistan Mission to the U.N, even though, as the court subsequently held, York River House v. Pakistan Mission to the U.N, 820 F. Supp. 760 (S.D.N.Y. 1993), the lessor could not be evicted).

of the FSIA's enactment, the Court also made reference to the report of the International Law Commission, in preparation for a draft United Nations Convention on Jurisdictional Immunities of States and Their Property, which project commenced shortly after the FSIA's enactment.[19] That document, the Court noted, discussed the longstanding international understanding that "[t]he acquisition and continued ownership of property in a foreign country 'is made possible only by virtue of the application of the internal law or private law of the State of the situs.'" App. 15-16, 446 F.3d at 373.

The Court of Appeals thus made reference to the international conventions as extrinsic aids to interpretation, or, in petitioners' own phrase, to "inform the proper interpretation of U.S. law intended to codify preexisting international law." Petition for Certiorari, p. 12. The Court of Appeals noted that both conventions embodied an international acceptance of the restrictive view of foreign sovereign immunity in disputes arising in connection with real property. It is irrelevant that the European Convention is inapplicable to the United States or to petitioners, that neither the United States nor petitioners are signatories to the United Nations Convention, that the latter convention would seek to resolve jurisdictional disputes through the International Court of Justice in the Hague, or that both conventions are applicable to private disputes.

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[19] International Law Commission, Documents of the Thirty-Fifth Session, II Y.B. Int'l L. Comm'n 47, U.N. Doc. A/CN. 4/363 and Add. 1 (1983).

III. The Court Of Appeals Appropriately Discussed Congressional Appropriations Acts That Were Of Relevance To The Subject Matter Of The Litigation.

Petitioners misapprehend the nature and extent of the Court of Appeals' consideration of the Foreign Operations, Export Financing Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005); and the Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004). These enactments require that 110 percent of unpaid property taxes owed by any country, as determined "in a court order or judgment entered against such country by a court of the United States or any State or subdivision thereof," be withheld from that country's foreign aid. The primary bases for the Court of Appeals' decision were not the Appropriations Acts, but rather a textual analysis of the statute, its legislative history, and the accepted parameters of the restrictive view of foreign sovereignty. In noting that "Congress has been actively involved in the issues directly pertaining to this litigation," App. 5, 446 F.3d at 368, the Court merely found an additional reason to reject "the narrow interpretation of the immovable-property exception put forward by [petitioners]," which it found "difficult to square with Congress's explicit reliance on the courts to adjudicate the property tax liabilities of foreign governments." App. 11, 446 F.3d at 371.

The Court thus did not, as petitioners argue, use "the views of a subsequent Congress [to infer] the intent of an earlier one." Cf. United States v. Price, 361 U.S. 304, 313,80 S. Ct. 326, 4 L. Ed. 2d 334 (1960). In any event,

although in presuming harmony between enactments, "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight." Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596, 100 S. Ct. 800, 63 L. Ed. 2d 36, (1980). See also, Federal Housing Administration v. Darlington, Inc., 358 U.S. 84, 90, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958); Bell v. N.J., 461 U.S. 773, 784, 103 S. Ct. 2187, 76 L. Ed. 2d 312 (1983).[20]

Rather, the Court emphasized that petitioners had presented no reasons that would justify a holding that would "make dead letters out of Congress's recent enactments, which were intended to address the exact controversy before [it]." App. 12, 446 F.3d at 371. The Court was appropriately loathe to "lightly reach such a result," particularly "where nothing in the statutory language or legislative history remotely requires it." Id.

It is not improper for a Court, as the Court of Appeals did here, to reject a statutory construction urged by a litigant that would, without a textual or other basis for that construction, render later enactments by Congress

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[20] Other authorities cited by petitioners are not relevant. The Court of Appeals did not characterize the appropriations acts as measures that repealed FSIA by implication, limited its operation, or conflicted with it. Cf. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 190-191, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); see also, Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1558 (D.C. Cir. 1984); United States v. Langston, 118 U.S. 389, 6 S. Ct. 1185, 30 L. Ed. 164 (1886). It certainly did not seek to apply the appropriations acts as measures negating or superseding administrative actions. Cf. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 629, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990).

ineffectual. See, Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), affd. sub nom. Reagan v. Abourezk, 484 U.S. 1, 108 S. Ct. 252, 98 L. Ed. 2d 1 (1987); 2A N. Singer, Sutherland Statutory Construction § 46.06 (4th ed. 1984). It is incumbent upon the courts to give statutes "the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." Clark v. Uebersee Finanz-Korporation, A. G., 332 U.S. 480, 488-489, 68 S. Ct. 174, 92 L. Ed. 88 (1947). As this Court has repeatedly noted, "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." Pittsburgh & L. E. R. Co. v. Railway Labor Executives' Ass'n, 491 U.S. 490, 510, 109 S. Ct. 2584, 105 L. Ed. 2d 415, (1989); see also, Morton v. Mancari, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). Courts are constrained "to give effect to each if we can do so while preserving their sense and purpose." Watt v. Alaska, 451 U.S. 259, 267, 101 S. Ct. 1673,68 L. Ed. 2d 80 (1981), and to engage in the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination. United States v. Fausto, 484 U.S. 439, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988).

The Court of Appeals' references to the appropriations bills therefore do not provide a sufficient basis for the review sought here.

IV. It Is Settled That The State Department's Opinion On The Interpretation Of The Jurisdictional Statute Merits No Special Deference. The State Department's Expression Of Concern For Retaliation Or Diplomatic Friction Was Vague, Speculative, And Not Based On A Foreign Policy Concern Particular To These Litigants. Upon Such A Showing, The Question of Deference to State Department Opinions Has Been Addressed By the Courts, With *Uniform* Results That Require Neither Correction Nor Clarification.

The Foreign Sovereign Immunities Act transferred the responsibility for making determinations concerning immunity from suit from the State Department to the courts.[21] See, Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983). As noted in Republic of Austria v. Altmann, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004):

> The Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity, . . . and transfers primary responsibility for

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[21] "A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity." H.R. Rep. No. 94-1487 at 20, reprinted at 1976 U.S.C.C.A.N. at 6619.

immunity determinations from the Executive to the Judicial Branch.

"Pure questions of statutory construction," such as that embodied in the Court of Appeals' decision here, are "well within the province of the Judiciary." INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987).

Altmann noted that (emphasis in original):

> While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference. . . . In contrast, should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy,

on a case by case basis, but it "express[ed] no opinion on the question whether . . . deference [to State Department expressions of opinion] should be granted in cases covered by the FSIA." Republic of Austria v. Altmann, 541 U.S. at 702.

In this case, the State Department provided its opinion on the interpretation of the jurisdictional statute, a matter that, as Altmann made clear, merits no special deference. Nor, even when discussing diplomatic considerations, did the State Department provide reasons why jurisdiction should not be exercised, as Altmann

requires, over a "particular" petitioner. Rather, as the Court of Appeals correctly stated, the possibilities cited by the State Department speak to a general fear of overseas retaliation, or diplomatic friction, "presented in a largely vague and speculative manner," and not in a degree "potentially severe enough or raised with the level of specificity required to justify presently a dismissal on foreign policy grounds." App. 22 n.17, 446 F.3d 277 n.16. Moreover, the State Department's opinions have a certain illogic. It was the spectre of reciprocal treatment cited by petitioners that provided the impetus to the international community to enact the Vienna Conventions that are the substantive subject matter of these litigations, and the very needs for predictability and evenhanded treatment which the State Department cites as necessary for diplomatic stability have been incorporated within the FSIA's jurisdictional provisions relied upon to allow for the orderly and fair adjudication of such questions in the United States courts.

Subsequent to Altmann, the question of deference has been addressed by the Courts of Appeal, with uniform results, including this case, that require neither correction nor clarification.[22] As noted by those cases and pre-Altmann cases,[23] the applicable standard is the principle

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[22] Whiteman v. Dorotheum GmbH & Co KG, 431 F.3d 57 (2d Cir. 2005); Abrams v. Societe Nationale des Chemins de Fer Francais, 389 F.3d 61 (2d Cir. 2004) (dicta); Wei Ye v. Jiang Zemin, 383 F.3d 620, 624-625 (7th Cir. 2004) (dicta); Hwang Geum Joo v. Japan, 413 F.3d 45 (D.C. Cir. 2005).

[23] E.g., 767 Third Avenue Associates v. Consulate General of Socialist Federal Rep. of Yugoslavia, 218 F. 3d 152, 160 (2d Cir. 2000).

governing political questions, the accepted formulation of which was set out in Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Baker noted that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211.[24] According to Baker, determining the amenability of a question to judicial resolution turns not on fear of or the likelihood of foreign repercussions, but requires a

> discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

Baker v. Carr, 369 U.S. at 211-212. In case-by-case inquiries under the political question doctrine, the Courts have consistently employed one or more of the "six

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[24] See also, Japan Whaling Assoc. v. American Cetacean Soc., 478 U.S. 221, 229-230, 106 S. Ct. 2860, 92 L. Ed. 2d 166 (1986). "Not every case touching foreign relations is nonjusticiable." Whiteman v. Dorotheum GmbH & Co KG, 431 F.3d at 69, citing Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995); see also, Planned Parenthood Fed'n of America, Inc. v. Agency for Int'l Development, 838 F.2d 649, 655 (2nd Cir. 1988). As the First Circuit has observed, "For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones." Ungar v. PLO, 402 F.3d 274, 281 (1st Cir. 2005); see also, Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, 937 F.2d 44, 49 (2d Cir. 1991).

independent tests" identified by the Supreme Court in Baker.[25]

As the Second Circuit noted here, and under the first three of the Baker tests, the parameters of the courts' subject-matter jurisdiction are not matters constitutionally committed to the executive branch. Judicially discoverable and manageable standards exist in FSIA for resolving the jurisdictional issue, and in the Vienna Conventions, inter alia, for resolving the substantive issues.[26] No policy determination not already embodied in positive law is thus required. As the Ninth Circuit wrote in Alperin v. Vatican Bank, 410 F.3d 532, 555 (9th Cir. 2005), "Deciding this sort of controversy is exactly what courts do."

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[25] See, 369 U.S. at 217. These tests include: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

[26] As noted by the Court of Appeals, App. 23, 446 F.3d at 377, "The instant dispute appears to revolve around the proper interpretation of a treaty (the Vienna Convention on Diplomatic Relations) and the application of that treaty to these facts. The Supreme Court has made clear that such a controversy is well within the competence and authority of the federal courts and is not a non-justiciable political question. See Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. at 230 (stating that "the courts have the authority to construe treaties").

This is not a situation, such as that in Whiteman v. Dorotheum GmbH & Co KG, 431 F.3d 57, Hwang Geum Joo v. Japan, 413 F.3d 45, or Garb v. Republic of Poland, 440 F.3d 579 (2d Cir. 2006), in which actions occurring outside the United States are cited as the prospective bases for the civil jurisdiction of United States courts. The subject matter of these suits does not pertain to a question of foreign policy at all, but, rather, because it involves rights in real property located within the United States, to one of quintessentially local interest. These cases concern rights in immovable property forming part of a pre-existing and ongoing legal environment into which petitioners have entered by purchasing, owning and using land in the United States, and as to which they have assumed responsibilities, subject to the limitations of international agreements, the parameters of which are appropriate for determination by United States courts. No countervailing interest has been identified that satisfies the relevant Baker tests so as to preclude the exercise of jurisdiction by the courts.

Nor is this a matter, such as Whiteman or Hwang Geum Joo, in which the United States, by executive agreement, had joined in the establishment of an alternative international forum for the settlement of claims, or committed its settled policy to a particular rule. The United States has entered into no agreements either promising any nation immunity from civil jurisdiction beyond that recognized by FSIA or authorizing the resolution of disputes of this nature in any forum other than American courts. The State Department's own representations to petitioners and other affected nations that they would be responsible for paying local property taxes on properties of the type involved in this suit indicate that an adjudication would not embarrass or demonstrate undue disrespect to a

settled policy of a coordinate branch of government. It has been the policy of the United States, consistent with the Vienna Conventions, not to provide exceptions to such property located outside the Washington, D.C. area from local real property taxation. Moreover, as the Court of Appeals noted, and as it has itself conceded, the State Department argued in the Englewood case for the proposition that tax liens implicate immovable property rights for purposes of the FSIA exception.[27]

Since no substantive questions have been reached at this juncture, and since the present decision of the Court of Appeals deals with only a threshold question involving the construction of the jurisdictional statute, that Court was correct in observing that "[i]n the course of the proceedings remanded to the district court, the United States is, of course, free to file a further statement of interest if it thinks developments so warrant." App. 22 n.17, 446 F.3d 277 n.16. In that significant regard, questions relating to the diplomatic ramifications of the amenability of the subject properties to taxation and the imposition of tax liens are asserted prematurely, and are not ripe for review.

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[27] "It is particularly inappropriate to defer to the executive branch's legal views here because its position as to the proper scope of the immovable-property exception is inconsistent with its previous interpretation." App. 22 n.17, 446 F.3d 277 n.16.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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In The
Supreme Court of the United States

THE PERMANENT MISSION OF INDIA
TO THE UNITED NATIONS AND THE
PERMANENT REPRESENTATIVE OF MONGOLIA
TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

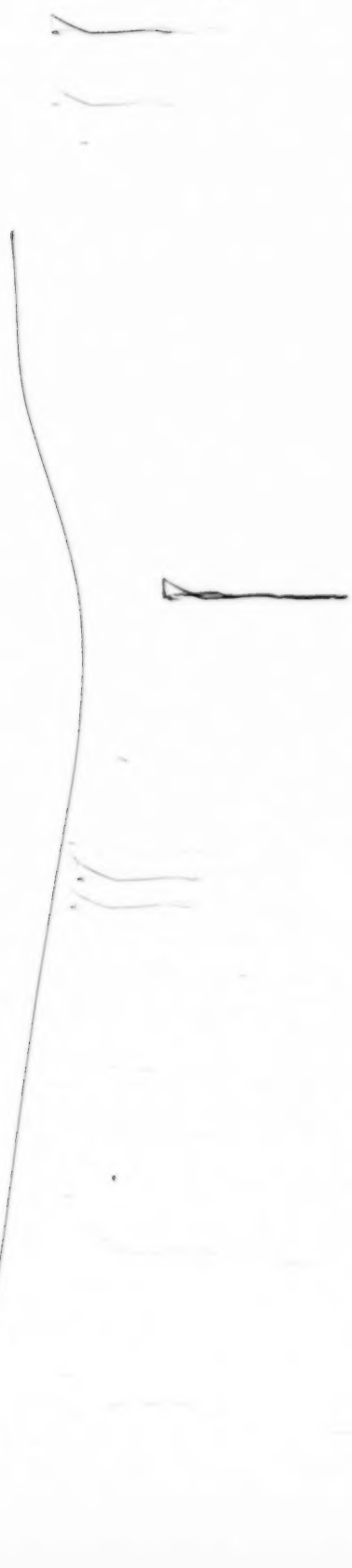
On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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There is a Mature, Live, and Credible Split in the Circuits.

As Petitioners demonstrated in their Petition for a Writ of Certiorari, (the "Petition") there is a present split in the circuits regarding the application of the "rights in immovable property" exception (28 U.S.C. § 1605(a)(4)) to the general denial of jurisdiction over foreign sovereigns guaranteed by the Foreign Sovereign Immunities Act of 1976 ("FSIA"). *See Petition* at 7-10. The Second Circuit created that split in affirming the district court's finding of jurisdiction over Petitioners, when it expressly rejected the converse holding in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985). *See City of New York v. The Permanent Mission of India to the United Nations*, 446 F.3d 365, 376 n.15 (2d Cir. 2006), (hereinafter ("App." at 20-21).

In *City of Englewood*, the Third Circuit reversed the district court's finding that there was jurisdiction under § 1605(a)(4), instead squarely holding that the "rights in immovable property" exception did not apply to actions to collect taxes against real property held by diplomatic missions. *City of Englewood*, 773 F.2d at 36. The court in *City of Englewood* analyzed § 1605(a)(4) and concluded that it applies to "disputes directly implicating property interests or rights to possession [of real property]." *Id.* (internal quotation marks omitted). Because it was not disputed that Libya had title to the "premises [and could] exclude others from possession thereof," the court held that "section 1605(a)(4) does not apply." *Id.* In doing so, it relied in part on *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522 (D.C. Cir. 1984), where that court considered the "immovable rights" exception to be limited – not applying to *any* potential property interest but instead only those "*directly* implicating property interests or rights to possession. . . ." 735 F.2d at 1522 (emphasis added).

Conversely, here, the Second Circuit relied on *Reclamantes* in coming to the opposite conclusion as that

of the Third Circuit in *City of Englewood*. Neither distinguishing *City of Englewood* nor adopting its reasoning, the court below applied the "immovable property" exception to the instant dispute and concluded that the district court did have jurisdiction. Despite the Third Circuit's similar reliance on *Reclamantes*, the Second Circuit reasoned that *Reclamantes* was supportive of its conclusion because the plaintiffs' claims in *Reclamantes* were not "property interests in real estate," rather, they were "purely of historical interest." App. 19 (quoting *Reclamantes*, 735 F.2d at 1523). Thus, even if the Second Circuit had not so expressly rejected *City of Englewood*, both circuits' competing reliance on *Reclamantes* underscores the two circuits' fundamental divergence in interpreting § 1605(a)(4): the Second Circuit interprets the section to apply at least to the tax liens at issue here (*i.e.*, any interest in real property); the Third Circuit interprets the section to apply only to "title" and "possessory" real property interests (*i.e.*, significantly more narrow real property interests). This square conflict is indisputable.

For its part, Respondent concedes that there is a split in the circuits, but asserts that it is not "cognizable" because of this case's posture (although it does not explain what aspect of the present case's posture so renders it and such is not apparent to Petitioners). Brief in Opposition at 13. Similarly unsupported and unsupportable, Respondent obfuscates the direct circuit split (i) with speculation about future cases the Third Circuit might hear; (ii) by claiming that the Third Circuit's decision was "superficial"; and (iii) by characterizing *City of Englewood* as outdated. *Id.* None of these assertions defuses the acute circuit split created by the court below, nor do they minimize the need for this Court to grant Certiorari.

First, Respondent's suggestion that the Third Circuit's decision in *City of Englewood* "is not likely to be followed, even within the Third Circuit" is a puzzle that Respondent does not deign to solve. *City of Englewood* is no further outside a "continuum" of decisions on this statute than

was the Second Circuit's decision below. To the contrary, Petitioners contend that it came to the correct result under the statute and the court's reasoning in *Reclamantes*. On the other hand, whether there is a continuum at all is debatable: *Reclamantes* does not address the specific issue confronted by both the Second and Third Circuits as it addressed claims far attenuated from the kinds of property interests addressed in *City of Englewood* and the case at bar. Thus, how Respondent can assert that *City of Englewood* would not be followed *in its own circuit*, simply because Respondent asserts that the present case is the proper heir to *Reclamantes*, is baffling.

Second, the Respondent's suggestion that the circuit split is "superficial" – apparently because Respondent considered the Third Circuit's opinion to "only briefly and parenthetically discuss[] the immovable-property exception" – ignores the fundamental distinction: foreign sovereigns with real property in New Jersey or other Third Circuit states are presently immune from real property tax lawsuits, but foreign sovereigns with real property in New York or other Second Circuit states are not. Yet Respondent urges this Court to discount the seriousness of this reality based on a word count of the competing decisions. That the Third Circuit's discussion encompassed three paragraphs whereas the Second Circuit wrote several times that, does not counteract the effect upon state tax actions against foreign sovereigns, nor does it render the result – immunity from suit in one circuit but not the other – somehow less significant.[1]

---

[1] Any alternative suggestion that the split is superficial because the immovable property exception holding in *City of Englewood* did not go to the heart of that decision, simply because it devotes more space to the commercial activity exception, is likewise flawed. The Third Circuit would have never reached the commercial activity exception if it had not ruled as it did on the property exception; thus, that holding was essential to its reversal of the district court.

Third, the fact that *City of Englewood* has been published authority for 21 years is wholly irrelevant in this context. It is not surprising that the Third Circuit has not had occasion to revisit § 1605(a)(4). It had already published clear, definitive authority in that circuit for district courts and potential litigants to observe and apply. There is no need for further enunciation because the Third Circuit came to a narrow-enough conclusion that in all probability forecloses many potential actions by municipalities on real property owned by diplomatic missions. In other words, there is nothing to suggest that the Third Circuit need revisit its decision in *City of Englewood* and hardly alarming that it has not done so. Respondent's purported ability to read the tea leaves that *City of Englewood* is headed for a forced retirement by the Third Circuit is without basis.

Finally, while it is true that real property tax actions against sovereign nations may not arise often, when they do, they are likely to (i) arise in one of two places – Washington, D.C., and New York City (and suburbs) – encompassed by four circuits; and (ii) raise critical issues of international comity. As to the first, it is consequently unlikely that such cases will arise elsewhere, greatly lessening the likelihood that percolation among the circuits will mature the circuit split. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (denying certiorari because – unlike here – "further study" by lower courts would benefit the Supreme Court). As to the second, although the cases may be few in number, those that do arise are each of vital importance to both the international community and international relations between the United States and foreign sovereigns. In fact, this Court has previously granted certiorari to interpret a related section of the FSIA – presumably because of the importance of the FSIA – and in that case even in the absence of a circuit split. *See Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (certiorari granted to interpret § 1605(a)(3)). Indeed, the FSIA was enacted in part to eliminate the precise problem presented by the circuit

split here: "[D]isparate treatment of cases involving foreign governments." H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 13 (1976). Accordingly, waiting on Respondent's speculation that the Third Circuit may "join the chorus" it extrapolates from *Reclamantes* and *City of New York*, or on other circuits to weigh in on this uncommonly-applied but crucial statute, would be unwarranted and injudicious.

CONCLUSION

For the reasons expressed above and for the reasons expressed in their Petition for Writ of Certiorari, Petitioners respectfully request that the Supreme Court grant the Petition.[2]

Dated: New York, New York
September 5, 2006

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[2] Petitioners also note that Respondent does not respond to Petitioners' suggestion that this Court should seek the views of the Solicitor General.

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No. 06-134

In the Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL., PETITIONERS

v.

CITY OF NEW YORK, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a suit to recover unpaid property taxes imposed on property owned by a foreign sovereign and to declare the validity of a tax lien arising out of those unpaid taxes falls within the immovable property exception to the general rule of immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1605(a)(4).

2. Whether the court of appeals erred in relying on two international agreements regarding foreign sovereign immunity to which the United States is not a party in the course of interpreting the FSIA.

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MacArthur Area Citizens Ass'n v. *Republic of Peru*, 809 F.2d 918 (D.C. Cir. 1987) 17, 18
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Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (2d ed. 1998) 10
Council of Europe, *European Convention on State Immunity: Explanatory Report* (visited Dec. 20, 2006) <http://conventions.coe.int/treaty/en/reports/html/074.htm> 12
6 *Digest of International Law* (1968) 6
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2 Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2d ed. 1945) 2, 6
Letter from Jack B. Tate, Acting Legal Adviser to Philip B. Perlman, Acting Att'y Gen. (May 19, 1962) 2, 7, 15
Melvyn Mitzner, *Liens and Encumbrances, in Real Estate Titles* (James M. Pedowitz ed., 1984) 16

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5 Richard R. Powell, *Powell on Real Property* (2005) ... 14
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1 *Yearbook of the International Law Commission, 1991* (Summary Records of Meetings of 43rd Sess.), Apr. 29-July 19, 1991 12

In the Supreme Court of the United States

No. 06-134

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL., PETITIONERS

v.

CITY OF NEW YORK, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the decision of the court of appeals is in error and the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

A. The Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*), provides "the sole basis for obtaining jurisdiction over a foreign state" in either state or federal court. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA establishes a general rule that a foreign sovereign is immune from civil suit in the United States. 28 U.S.C. 1604. The FSIA also sets out limited exceptions to that grant of immunity. 28 U.S.C. 1605. A court may exercise jurisdiction over a foreign

state only if the suit comes within one of the FSIA's specified exceptions to immunity. 28 U.S.C. 1330(a).

"For the most part," the FSIA "codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480, 488 (1983). That theory was announced for the United States in 1952 in the "Tate Letter." See Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter) *reproduced in Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682, 711-715 (1976). The Tate Letter stated the Department of State's policy that foreign states should thenceforth be granted immunity only for their sovereign or public acts (*jure imperii*), and not for their commercial acts (*jure gestionis*). *Ibid.*; *Verlinden*, 461 U.S. at 486-487.

Even before the Tate Letter, when the United States adhered to the so-called "absolute" theory of foreign sovereign immunity, it was established that "a foreign power which acquires" immovable property in the territory of another sovereign is "deemed to do so subject to the condition that the territorial sovereign may subject to adjudication before its tribunals questions pertaining to title or the adverse interests of individual claimants." 2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945); Tate Letter, *supra* ("[t]here is agreement by proponents of both [the absolute and restrictive] theories * * * that sovereign immunity should not be claimed or granted in actions with respect to real property") (*Alfred Dunhill*, 425 U.S. at 711).

The immunity exception for immovable property was carried forward in the FSIA in 28 U.S.C. 1605(a)(4). That exception provides that a foreign state shall not be immune in any case "in which * * * rights in immovable property situated in the United States are in issue." *Ibid.*

B. Respondent, the City of New York, brought suit against the Permanent Mission of India to the United Nations and the Permanent Representative of Mongolia to the United Nations for their failure to pay local property taxes imposed by respondent on

certain properties owned by the governments of India and Mongolia. The properties contain the offices of petitioners' missions to the United Nations and are used in part to house employees of the missions at a level below that of Permanent Resident or Consul General. Respondent contends that under New York law the part of the properties used for such housing is taxable. N.Y. Real Prop. Tax Law § 418(1) (McKinney's 2000).

Respondent seeks recovery of $16.4 million in unpaid taxes and interest from India, and $2.1 million from Mongolia, representing property taxes dating between 1981 and 2003. Pet. App. 4. Respondent also seeks a declaratory judgment establishing the validity of tax liens on the properties due to petitioners' failure to pay the taxes levied by respondent. *Id.* at 21 n.16.[1] Petitioners maintain that the FSIA immunizes them from respon-dent's suit and, ultimately, that the property in question is exempt from taxation pursuant to treaty. *Id.* at 22-23, 28 n.2.

C. The district court denied petitioners' motion to dismiss the claims against them as barred by foreign sovereign immunity. Pet. App. 25-45. The court held that it possessed jurisdiction over respondent's claims pursuant to the FSIA's "immovable property" exception, 28 U.S.C. 1605(a)(4). Pet. App. 21. The court did not reach respondent's alternative theory that the court possessed jurisdiction in light of the "commercial activity" exception to immunity, 28 U.S.C. 1605(a)(2). Pet. App. 21.

Petitioners appealed from the denial of immunity, and the court of appeals affirmed. Pet. App. 1-24. The court of appeals construed the immovable property exception as extending to cases involving three types of issues: "(1) the foreign country's rights to or interest in immovable property situated in the United

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[1] Respondent's complaints initially sought to foreclose on the properties. See Am. Compl. ¶ 1 (requesting a "Judgment of Foreclosure"); N.Y.C. Admin. Code § 11-354 (2003) (authorizing city to maintain an action to foreclose a tax lien by, *inter alia*, selling property subject to tax lien "to the highest responsible bidder"). Respondent conceded in the court of appeals, however, that it would not be able to execute a judgment against the properties, see C.A. Br. 31-32, because execution would be barred by the FSIA, see 28 U.S.C. 1609-1611.

States; (2) the foreign country's use or possession of such immovable property; or (3) the foreign country's obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime." *Id.* at 17-18 & n.13. The court found the text of the exception itself to be "ambiguous," *id.* at 8, and so it consulted other sources to aid its interpretation. In particular, the court of appeals relied on the fact that the European Convention on State Immunity denies immunity for "obligations arising out of [the state's] rights or interests in, or use or possession of, immovable property," *id.* at 13 (quoting European Convention on State Immunity (European Convention), 11 I.L.M. 473 (1972), Art. 9), and on a similar provision in Article 13 of the United Nations Convention on Jurisdictional Immunities of States and Their Properties (U.N. Convention), 44 I.L.M. 808 (2005) (not yet in force), Pet. App. 14 n. 9.

The court of appeals recognized that its decision was contrary to the holding of the Third Circuit on "facts very similar to those of this case" in *City of Englewood* v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (1985). Pet. App. 20 n.15. But the court found the Third Circuit's reasoning "unpersuasive." *Id.* at 21 n.15. The court also acknowledged that the State Department had, at the court's invitation, submitted a statement supporting petitioners' narrower construction of the immovable property exception and noting that a contrary ruling would have adverse foreign policy consequences for the United States. *Id.* at 21-22 n.17. The court concluded, however, that the State Department's views with respect to the FSIA's meaning were entitled to no special deference and that the government's policy concerns were too "vague" and insufficiently "severe" to preclude the exercise of jurisdiction. *Ibid.*

DISCUSSION

The FSIA's "immovable property" exception, 28 U.S.C. 1605(a)(4), permits a district court to exercise jurisdiction over a foreign sovereign in a case in which "rights in immovable prop-

erty situated in the United States are in issue." The court of appeals construed that exception to include not only disputes concerning "*rights in* immovable property," *ibid.* (emphasis added), but also any dispute regarding "the foreign country's obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime." Pet. App. 17-18 & n.13. That interpretation sweeps far more broadly than either the text of the provision or the history of sovereign immunity practice supports.

This Court should grant the petition in order to review the court of appeals' erroneous holding. The court of appeals acknowledged that its construction of Section 1605(a)(4) is in conflict with that of the Third Circuit. In addition, it is in considerable tension with decisions of the District of Columbia and First Circuits. Moreover, because the court of appeals' construction of Section 1605(a)(4) diverges from accepted international norms, it is likely to have adverse consequences for the Nation's foreign policy, including retaliatory measures taken against the United States. The ruling below takes on additional significance because many countries' missions to the United Nations Headquarters are located within the Second Circuit.

A. THE COURT OF APPEALS' EXPANSIVE CONSTRUCTION OF SECTION 1605(a)(4) IS INCONSISTENT WITH ITS TEXT AND THE HISTORICAL PRACTICE THAT IT CODIFIED

1. Section 1605(a)(4) establishes a narrow exception to foreign state immunity for cases in which "rights in immovable property * * * are in issue." 28 U.S.C. 1605(a)(4). The requirement that "rights in" real property actually be "in issue" makes clear that rights of ownership, use, or possession of the property itself must be at stake for the exception to be implicated. See *Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 13 (1st Cir. 2002) ("[T]he immovable property exception applies only in cases in which rights of ownership, use, or possession are at issue."). Contrary to respondent's contention (Br. in Opp. 15), the "taxability of the property" is not a "right in" the property in any ordinary

meaning of that term. Nor is it reasonable to construe that phrase, as the court of appeals did, to connote all "obligations arising directly out of such rights to or use of the property," including "obligations imposed by the local government as part of its property law regime." Pet. App. 17-18 & n.13. Congress spoke of "rights," not "obligations," and specifically of rights "in" property, not broadly of obligations "arising directly out of" a foreign sovereign's relationship to the property. Because the court of appeals' interpretation is not supported by the statute's text, it should be rejected.

2. Even if the statutory phrase were ambiguous with regard to the question here presented, it must be understood by reference to "the pre-existing real property exception to sovereign immunity recognized by international practice" at the time the FSIA was enacted. *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 470 U.S. 1051 (1985); see *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 613 (1992) (FSIA's immunity exceptions should be construed in light of the understanding of "the restrictive theory at the time the statute was enacted").

Treatises on international law that pre-dated the FSIA emphasized the narrow nature of the real property exception. One commentator, for example, described the exception as permitting a foreign state to be sued to resolve "questions pertaining to title or the adverse interests of individual claimants." Hyde, *supra*, at 848. And the Restatement (Second) of Foreign Relations Law of the United States (Second Restatement) emphasized that the exception did not abrogate immunity "with respect to a claim arising out of a foreign state's ownership or possession of immovable property" that did "not contest[] such ownership or the right to possession." Second Restatement § 68 cmt. d at 207 (1965). See 6 *Digest of International Law* 638 (1968) (quoting the same); *Reclamantes*, 735 F.2d at 1522 (noting that the traditional real

property exception was "limited to disputes directly implicating property interests or rights to possession").[2]

The real property exception pre-dates not only the FSIA, but also the restrictive theory of immunity, which is itself instructive regarding the narrowness of the exception's scope. The Tate Letter noted that "[t]here is agreement by proponents of both [the absolute and restrictive] theories * * * that sovereign immunity should not be claimed or granted in actions with respect to real property." See Tate Letter *in Alfred Dunhill*, 425 U.S. at 711. Thus, contrary to the court of appeals' understanding (Pet. App. 9), the real property exception is not rooted in the restrictive theory of immunity, on the supposed premise that "ownership of real estate in a foreign country must be considered [a private act]" and therefore subjects a foreign sovereign to suit in the same way a private person would be. Rather, the real property exception traces its roots to the time of absolute immunity, and

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[2] The Restatement (Third) of Foreign Relations Law of the United States (Third Restatement), published in 1987, is obviously a less relevant source for interpreting the FSIA of 1976 than the Second Restatement. The Third Restatement states that the immovable property exception extends as well to "controversies concerning payment of rent, taxes, and other fees concerning [embassy, consulate, or diplomatic mission] * * * property." 2 Third Restatement § 455 cmt. b. In this particular, the Restatement appears to be aspirational rather than strictly a restatement of the law. To the extent the Third Restatement suggests that a court may exercise jurisdiction over a claim seeking payment of a money obligation divorced from title, possession, or use of real property, that construction has been rejected by the First Circuit. See *Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 13 (2002). Moreover, so broad an interpretation of Section 1605(a)(4) would be in seeming contradiction with the Third Restatement's narrower construction of the term "rights in property" as employed in the FSIA's expropriation exception, 28 U.S.C. 1605(a)(3). That phrase, according to the Third Restatement, "is limited to actions asserting title to property and claims to compensation for taking." Third Restatement § 455 cmt. c. The Second Circuit has directed courts to be "vigilant" when relying on the "controversial" Third Restatement. *United States* v. *Yousef*, 327 F.3d 56, 100 n. 31 (2003). That admonition is particularly appropriate when, as here, the Third Restatement seeks, without citation to authority, to broaden a rule after Congress has codified established practice.

reflects that even those who rejected the notion that a foreign sovereign should be subject to suit for its private acts recognized a real property exception because of the territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Reclamantes*, 735 F.2d at 1521. Thus, for example, a court is not barred from adjudicating a quiet title action with respect to a local property simply because one potential claimant is a foreign sovereign. In contrast, efforts by one sovereign to collect property taxes from another sovereign is by no account the kind of "primeval interest" concerning real property itself that would have been recognized during the period of so-called "absolute" immunity from the courts' jurisdiction.[3]

The court of appeals cited two pre-FSIA decisions in support of its conclusion that courts in the United States possessed jurisdiction over claims concerning taxes levied against a foreign sovereign's real property. Pet. App. 17 n. 12 (citing *Republic of Argentina* v. *City of New York*, 25 N.Y.2d 252 (1969), and *United States* v. *City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971)). Neither of those cases, however, involved the exercise of jurisdiction over a claim brought against a foreign sovereign or its property, and thus neither presented a question of immunity. In *Republic of*

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[3] The court of appeals cited *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), in support of the proposition that "[w]hen owning property abroad, a foreign state must follow all the same laws that pertain to private owners of such property." Pet. App. 16-17. To the contrary, in *The Schooner Exchange* the Court expressly declined to "indicat[e] any opinion on [the] question" whether a foreign sovereign's "private property" should be treated in the same manner as that of private individuals. 11 U.S. (7 Cranch) at 145. Moreover, the court of appeals confused the question of a foreign state's obligation to obey local law with the availability of local judicial jurisdiction to compel compliance. With respect to the latter, the Court made clear that no jurisdiction could be presumed over a foreign sovereign's "public" property, such as an armed ship, "employed by him in national objects." *Ibid.* Thus, *The Schooner Exchange* does not support the exercise of jurisdiction over the property of a foreign state used for public purposes, such as the housing of a diplomatic mission and its staff.

Argentina, the foreign state affirmatively invoked the jurisdiction of the court to seek the return of municipal taxes that had already been paid and a declaration that no further taxes were owed. 25 N.Y. 2d at 257. Argentina thus waived any immunity from the court's exercise of jurisdiction to render a declaration regarding the taxes' validity (which the court did, in favor of Argentina). In *Glen Cove*, no foreign state was even a party to the litigation. Rather, the United States sued (successfully) to enjoin the assessment of taxes against a diplomatic residence of the Soviet Union and to have tax liens against the property discharged. 322 F. Supp. at 150, 155.

Respondent acknowledges that, "prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax dispute." Br. in Opp. 15. Respondent maintains, however, that that fact "is of no significance, because it is also true that no court during that period declined to exercise such jurisdiction." *Id.* at 15-16. That is not so. For example, in *City of New Rochelle* v. *Republic of Ghana*, 255 N.Y.S. 2d 178 (County Ct. 1964), the court dismissed, on the basis of the State Department's suggestion of immunity, the municipality's suit to foreclose on tax liens on real property owned by several foreign countries for the purpose of housing their principal representatives to the United Nations. *Id.* at 179. See also *Re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] 2 D.L.R. 481, 500 (recognizing that "Courts * * * are without jurisdiction" to determine a tax against a foreign sovereign's land).

In any event, contrary to respondent's suggestion, the dearth of pre-FSIA cases addressing foreign states' immunity from suit regarding tax liabilities on real property is not neutral as to the parties' respective positions. Rather, it reflects the widespread understanding that foreign sovereigns and their property enjoyed immunity from such suits. It has always been the general rule in the United States that foreign sovereigns are immune from the courts' jurisdiction, subject to specific exemptions. Respondent's inability to cite pre-FSIA examples of courts exercising jurisdic-

tion over property tax claims is strong evidence that no exception to the general rule of immunity existed as to such claims. In fact, one reason given by those commentators who argued that foreign sovereigns should be exempt from property taxes in the first place was "the impossibility of collecting any taxes, since foreign states and their property are not subject to suit or judicial process." William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239, 256 (1952)). See *id.* at 242 (quoting V Op. Att'y Gen. Mass. 445 (1920) ("[E]ven in the event that a tax [on personal property] were valid, no proceedings could be had in any court in the Commonwealth to enforce its payment, either against the foreign government or the property taxed so long as it was owned by that government. This fact alone strongly indicates that it was never intended by our statutes to impose such a tax.").

3. International agreements also support the conclusion that the immovable property exception does not abrogate immunity for the broad range of claims indicated by the court of appeals. The Vienna Convention on Diplomatic Relations (Vienna Convention), to which the United States is a party, 23 U.S.T. 3227 (1972), contains, in Article 31, an analogous exception to the immunity of diplomatic agents for "*a real action* relating to private immovable property situated in the territory of the receiving State, unless [the agent] holds it on behalf of the sending State for the purposes of the mission." *Id.* at 3240 (emphasis added). The term "a real action" excludes "actions for recovery of rent or performance of other obligations deriving from ownership or possession of immovable property." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 238 (2d ed. 1998). Notably, the House Report on the FSIA specifically refers to the Vienna Convention in its discussion of the immovable property exception to immunity in Section 1605(a)(4) and

reflects Congress's understanding that the FSIA was consistent with it. See H.R. Rep. 1487, at 20.[4]

The court of appeals looked to and misinterpreted the European Convention and the U.N. Convention as supporting a broader construction of the FSIA's immovable property exception that encompasses suits regarding "obligations arising directly out of [a foreign state's] rights to or use of [immovable] property." Pet. App. 18. See *id.* at 13-16. Article 9 of the European Convention abrogates immunity for suits involving not only a foreign state's "rights or interests in, or its use or possession of, immovable property," but also its "obligations arising out of its rights or interests in, or use or possession of, immovable property." 11 I.L.M. at 473; see Pet. App. 13. And Article 13 of the U.N. Convention similarly provides an exception to immunity in cases involving not only "any right or interest of the State in, or possession of," immovable property, but also "any obligation of the State arising out of its interest in, or its possession or use of, immovable property." 44 I.L.M. at 808; see Pet. App. 14 n.9. The court of appeals found it inconsequential that Congress did not enact in the FSIA language such as that used in the latter portion of the exception in those conventions. *Id.* at 14. The court viewed the language of Section 1605(a)(4) as sufficiently "broad" that it did not "preclude[] its interpretation as synonymous to the European Convention." *Ibid.* As petitioner points out (Pet. 12), however, Section 1605(a)(4) creates an exception to a foreign state's immunity only for cases in which "rights in" immovable property are themselves "in issue," not cases involving "obligations arising out of" the foreign state's rights or interests in or possession of such property.

Moreover, even the European and U.N. Conventions in fact do not abrogate immunity in a case such as this. The court of

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[4] The FSIA, of course, contains separate provisions regarding attachment and execution that would govern actual relief, such as an order of sale or possession of a foreign state's property. See 28 U.S.C. 1609, 1610, 1611; see note 1, *supra*.

appeals overlooked the fact that Article 29 of the European Convention explicitly excludes proceedings concerning "customs duties, taxes or penalties" from its coverage. 11 I.L.M. at 481. Such claims involving public law disputes between states are outside the scope of the Convention, which "is essentially concerned with 'private law' disputes between individuals and States." Council of Europe, *European Convention on State Immunity: Explanatory Report* ¶ 113 (visited Dec. 20, 2006) <http://conventions.coe.int/treaty/en/Reports/HTML/074.htm>. The drafting history of the U.N. Convention similarly makes clear that Article 13 was not understood to permit suits to recover taxes or to impose tax liens on foreign state-owned property. In the early stages of drafting, the International Law Commission included both an immovable property exception (mirroring that ultimately adopted as Article 13) and also a separate provision waiving immunity for suits to collect taxes on real property used for commercial purposes. See *Sixth Report on Jurisdictional Immunities of States and Their Property*, Sompong Sucharitkul, Special Rapporteur, Agenda Item 3, at 21-25, Art. 17, U.N. Doc. A/CH.4/376 (1984) (Art. 17), *at* <http://untreaty.un.org/ilc/documentation/english/a_cn4_376.pdf>. The tax exception was subsequently deleted, with the explanation that it implicated state-to-state relations rather than the types of dispute between states and private persons that the Convention was intended to address. See *Yearbook of the International Law Commission 1991*, Vol. 1 (Summary Records of Meetings of 43rd Sess., Apr. 29-Jul. 19, 1991), at 84 (¶ 6). The clear implication is therefore that the drafters of the U.N. Convention did not understand property tax claims to fall within that Convention's immovable property exception.[5]

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[5] The United Kingdom's State Immunity Act 1978, 17 I.L.M. 1123 (1978), has a real property exception nearly verbatim to the European Convention's. *Id.* at 1125 (¶ 6(1)(b)). Significantly, it has a *separate* exception for tax claims that, with respect to real property, is limited to premises occupied by the foreign sovereign "for commercial purposes." *Id.* at 1126 (¶ 11(b)). Of course, both the separate exception and its limitation to commercial property would be

Thus, contrary to the court of appeals' belief that it was construing the FSIA's language "as synonymous to the European Convention's version," Pet. App. 14, and furthering "conformity" in practice among nations, *id.* at 12, the court has in fact introduced a significant and unwarranted inconsistency in international practice. The conventions reflect the understanding of their drafters that, even in the era of the restrictive theory, the longstanding exception to immunity for suits involving rights in immovable property does not subject a foreign sovereign to suit on a state-to-state dispute over whether property is subject to taxation.[6]

4. As an alternative basis to defend the court of appeals' judgment, respondent contends that its asserted tax lien is a "right in immovable property," which serves as a basis for the court's juris-

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superfluous if the real property exception had the breadth attributed to it by the court below.

[6] The court of appeals also erred in relying on appropriations legislation enacted by Congress in 2004 and 2005 in construing the FSIA's immovable property exception. See Pet. App. 11-12. Those enactments provide for the deduction from foreign aid to a country of an amount "equal to 110 percent of the * * * unpaid property taxes owed by the central government of such country" to New York City or the District of Columbia, as determined "in a court order or judgment entered against such country by a court of the United States." Pub. L. No. 109-102, § 543(a) and (f)(4), 119 Stat. 2214-2215; Pub. L. No. 108-447, § 543(a) and (f)(4), 118 Stat. 3011-3012.

Legislative action nearly 30 years after enactment of the FSIA provides "a hazardous basis for inferring the intent" of the earlier Congress. *PBGC* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks and citation omitted). The fact that Congress has provided a mechanism for fulfilling judgments in the event they are rendered says nothing about whether Section 1605(a)(4), enacted 30 years earlier, is an appropriate basis for exercising jurisdiction over such claims. Moreover, contrary to the court of appeals' understanding, petitioners' construction of the immovable property exception would not "make dead letters" of the more recent enactments. Pet. App. 12. Neither provision refers to the immovable property exception, and each could be given full effect as to judgments rendered pursuant to Section 1605(a)(1) (waiver of immunity) or in a suit brought *by* a foreign state, *e.g.*, *Republic of Argentina* v. *City of New York*, 25 N.Y.2d 252 (1969).

diction. Br. in Opp. 15. As respondent acknowledges (*id.* at 5), however, the court of appeals specifically disavowed any reliance on "[t]he fact that [petitioners'] alleged obligations have converted into tax liens." Pet. App. 21 n.16. Respondent's alternative theory suffers from at least two defects. First, a lien to secure a debt is not a "right in immovable property" to which Section 1605(a)(4) applies. Second, allowing respondent's purported lien to serve as the basis for exercising jurisdiction would violate the FSIA's prohibitions against pre-judgment attachments and in rem jurisdiction.

a. Section 1605(a)(4) abrogates immunity only with respect to cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). A tax lien is not a "right in" real property, but merely provides security for payment of a money debt. See *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (liens are "merely a means to the end of satisfying a claim for the recovery of money," providing a compensatory remedy rather than specific relief); *Weinstein* v. *Taylor*, 234 N.Y.S.2d 926, 926 (Sup. Ct. 1962) (tax lien is not an "estate or interest in real property"); 5 Richard R. Powell, *Powell on Real Property* § 38.02[2], at 38-7 (2005) (a judgment lien "is not an estate in the debtor's land"); 5 Restatement (First) of the Law of Property § 540 cmt. a, at 3238 (1944) (First Restatement) ("the lien constitutes merely additional security for the performance of the promise").[7]

In support of its broader construction of the exception, respondent cites (Br. in Opp. 15 n.16), as did the court of appeals (Pet. App. 10-11), a reference in the legislative history of Section 1605(a)(4) to "questions of ownership, rent, servitudes, and similar matters," H.R. Rep. 1487, at 20. It is far from clear that the House Report reference signifies an intent (let alone would pro-

[7] That is not to say that a lien is not itself "property," but only that it is not among the "rights in immovable property" specified in 28 U.S.C. 1605(a)(4). Cf. *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983) (noting that debtor's property subject to tax lien was part of debtor's estate, and that holder of tax lien could not resort to the "remedy of possession").

vide a sufficient basis) to expand the preexisting real property exception to include, for example, a new category encompassing all rent claims. See *Fagot Rodriguez*, 297 F.3d at 11 (rejecting non-possessory claim for back rent); *Reclamantes*, 735 F.2d at 1522 n.5.[8]

In any event, the quoted language in the legislative history does not encompass an action to establish the validity of a lien. The common law did not even recognize a lien on land. 5 Herbert Thorndike Tiffany, *The Law of Real Property* § 1559, at 650 (3d ed. 1939). It also distinguished clearly between a lien and a servitude (or "servient tenement"), the latter constituting a direct interference with the ownership, possession, or use of one's land. See 3 Tiffany, *supra*, §§ 756, 758, at 200-201, 203-204; see also 5 First Restatement § 450 & cmt. a, § 455, at 2901-2903, 2919. A lien is different from rights in land such as covenants, easements and servitudes in important respects. For example, an order to sell property in bankruptcy free and clear of all liens, claims encumbrances and rights "does not indicate that the property is to be sold free and clear of non-monetary restrictions of record which run with the land," such as servitudes. *In re Oyster Bay Cove, Ltd. Bankr.*, 161 B.R. 338, 343 (E.D.N.Y. 1994). A lien holder's primary claim is to the payment of debt, whereas a person suing for title, possession, or enforcement of a servitude seeks an immediate interest in the property itself. Especially in light of the historical origins of the immovable property exception, a lien is not a "similar matter" to issues of ownership, servitudes on the

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[8] The cited language appears in the Report's response to a hypothetical objection that the scope of Section 1605(a)(4) was inconsistent with the Tate Letter's statement that "diplomatic and perhaps consular property" was "excepted" from the real property rule. The Report states that the Tate Letter referred only to "attachment" or "execution" of diplomatic property, and then observes that the Vienna Convention would permit adjudication of "questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed." H.R. Rep. 1487, at 20. The report does not specify whether its reference to "rent" refers to the Vienna Convention's real property exception or to its commercial activity exception.

land, and even rents. It is one thing to ensure that foreign sovereign immunity does not prevent adjudication of title and covenants in real property—matters at the heart of the sovereign's primeval interest in real property within the realm—and quite another to expand the exception to cover debt collection efforts that attempt to use the property as a security.[9]

b. The second defect in respondent's tax lien theory was identified by the court of appeals, see Pet. App. 21 n.16, namely that it is contrary to the FSIA's prohibition against using pre-judgment attachment to establish jurisdiction. See 28 U.S.C. 1609-1610; 28 U.S.C. 1610(d)(2) (permitting pre-judgment attachment only by waiver or "to secure satisfaction of a judgment * * * and not to obtain jurisdiction"); H.R. Rep. 1487, at 26-27 (FSIA was intended to end the practice of permitting "an attachment for the purpose of obtaining jurisdiction over a foreign state or its property").[10] Indeed, the FSIA significantly limits the measures of restraint against sovereign property that a court can impose even in the event of a judgment. See 28 U.S.C. 1610(a)(4)(B); 28 U.S.C. 1610(a). Given such restrictions on the court's ability to impose measures in aid of execution, it is inconceivable that respondent could, through the mere statutory declaration of a lien or other self-help measures, create jurisdiction in the court.

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[9] Notably, New York law creates a host of other liens related to real property, including an emergency repair lien; relocation lien; pest control lien; housing violations and civil penalty lien; canopy lien; leaking tap lien; building inspection fees lien; sidewalk repair lien; and environmental control board lien. See Melvyn Mitzner, *Liens and Encumbrances, in Real Estate Titles* 311-314 (James M. Pedowitz ed., 1984). It is all but inconceivable that Congress intended to abrogate immunity with respect to so broad an array of municipal claims by its reference to "rights in immovable property" in Section 1605(a)(4).

[10] Indeed, the only FSIA provision pertaining to liens, the exception from jurisdictional immunity for a suit in admiralty brought to enforce a commercial maritime lien, converts the claim into an *in personam* action against the foreign state, and does not allow arrest of the vessel. See 28 U.S.C. 1605(b); H.R. Rep. 1487, at 21-22.

B. THE COURT OF APPEALS' DECISION WARRANTS THIS COURT'S REVIEW

1. The court of appeals' decision creates an acknowledged circuit conflict with respect to the meaning of Section 1605(a)(4). The Second Circuit recognized (Pet. App. 20 n.15) that its decision is contrary to the Third Circuit's in *City of Englewood* v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (1985). And although the court of appeals did not acknowledge the point, its interpretation of Section 1605(a)(4) is also contrary to that of the District of Columbia and First Circuits.

In *Englewood*, the Third Circuit held that a suit to establish the amount of real property taxes owed by the Government of Libya and the validity of a tax lien against the property did not fall within the scope of Section 1605(a)(4). 773 F.2d at 36. The court construed the exception as limited to claims concerning "title" or the "right to exclude others from possession." *Ibid.*[11]

The District of Columbia and First Circuits have similarly recognized that the FSIA's immovable property exception "was not intended broadly to abrogate immunity for any action touching upon real estate," *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987), but is limited to "cases in which rights of ownership, use, or possession are at issue,"

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[11] The United States filed an amicus brief in support of a petition for rehearing in *Englewood*, asserting that suits to recover unpaid taxes on foreign states' real property are cognizable under Section 1605(a)(4). The government relied heavily on the perceived anomaly of allowing a foreign state to shield itself from judicial enforcement of property taxes if it is nevertheless obligated to pay the tax. The United States' brief did not discuss the significance of pre-FSIA practice, nor did it recognize the inconsistency between the lien-theory of jurisdiction and the FSIA's anti-attachment provisions. It also made the same error as the court of appeals when it cited the broad language of the immovable property exception in the European Convention (Art. 9) but overlooked the specific exclusion for proceedings related to taxes on immovable property (Art. 29). Upon further consideration, the United States concluded, and advised the court below, that the position stated in its *Englewood* brief was in error.

Fagot Rodriguez, 297 F.3d at 13. See, *e.g.*, *Reclamantes*, 735 F.2d at 1520-1522 & n.5 (noting that Section 1605(a)(4) is focused on disputes over title and possession). Those courts have rejected a claim for "purely compensatory rights," such as unpaid rent, *Fagot Rodriguez*, 297 F.3d at 11, and nuisance, *MacArthur Area Citizens*, 809 F.2d at 921, even if those claims arise, in the words of the court of appeals in this case, "out of * * * use of the property." Pet. App. 18.[12] The court of appeals attempted to distinguish *Fagot Rodriguez* and *MacArthur Area Citizens* on their facts on the theory that, unlike in this case, no ongoing property dispute existed at the time the court of appeals ruled. See *id.* at 19 n.14. That distinction is not persuasive. In each case, the court made clear that jurisdiction would have been appropriate only if the plaintiff had made some claim *to the property itself*. See *Fagot Rodriguez*, 297 F.3d at 13 (rental disputes "unaccompanied by issues of ownership, possession, or use" are not within the real property exception); *MacArthur Area Citizens*, 809 F.2d at 921 (emphasizing that the plaintiff "makes no claim to any interest in that property"). Thus, the supposed distinction urged by the court below is merely a feature of happenstance, not a distinction of jurisdictional significance.

Moreover, the issue on which the courts of appeals are divided is important to our Nation's foreign relations. The Second Circuit is the home of the United Nations Headquarters and most missions to that international body. As the Department of State explained in its submission to the court of appeals, the exercise by

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[12] In *Reclamantes*, the District of Columbia Circuit expressed the view in dictum that an interpretation of Section 1605(a)(4) as limited to disputes directly implicating property interests or rights to possession was consistent with an unpublished district court decision holding that Section 1605(a)(4) allowed a suit for a declaratory judgment that a foreign state's property was subject to a tax lien. See 735 F.2d at 1522 (discussing *County Board* v. *Government of the German Democratic Republic*, Civil No. 78-293-A (E.D. Va. Sept. 6, 1978)). The court of appeals held, however, that claims arising out of the alleged taking and conversion of certain land grants did not fall within the exception. *Id.* at 1522-1524.

courts in the United States of jurisdiction over claims for unpaid property taxes and for tax liens on foreign state property is likely to give rise to complaints "that the United States is failing to live up to its obligation to protect [the U.N. diplomatic community] against infringements of sovereign immunity" and may provoke referral of the matter to the International Court of Justice by the United Nations. Gov't C.A. Br. 9-10.[13] There is also a danger that foreign governments will retaliate, by placing liens on United States-owned real property abroad, or otherwise hindering the ability of the United States' missions abroad to buy, sell and construct diplomatic properties. One foreign state defendant has already responded to the assertion of jurisdiction over it by blocking the United States Government's sale of a major piece of property in that country.

Because of the circuit conflict and the importance of the immunity issue, review by this Court is warranted. There is no need, however, for the Court to grant independent review on the second question presented in the petition (Pet. i)—whether the court of appeals erred in considering the European Convention and the United Nations Convention in the course of determining the scope of foreign sovereign immunity conferred by the FSIA. The question whether and to what extent those international agreements shed light on the proper construction of the FSIA's immovable property exception is subsumed within the first question presented.

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[13] Notably, since the court of appeals' decision was issued in this case, additional suits to enforce tax liens have been filed against foreign states. See *City of New Rochelle* v. *Republic of Liberia*, No. 06 Civ. 5969 (S.D.N.Y.); *City of New Rochelle* v. *Republique Federale du Cameroun*, No. 06 Civ. 5970 (S.D.N.Y.). See also Pet. App. 4 n.2. (noting similar lawsuits brought by respondent against the Governments of Turkey and the Philippines).

CONCLUSION

The petition for a writ of certiorari should be granted, limited to the first question presented.

Respectfully submitted.

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DECEMBER 2006

4

(10)

No. 06-134

FILED
FEB 27 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, and THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 25, 2006
Certiorari Granted January 19, 2007

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Exhibit A – Amended Complaint for Foreclosure of Tax Liens and Other Relief dated December 23, 2003 (Reproduced herein at pages 70 to 79)

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Exhibit C – India's Second Supplemental Responses to Plaintiff's First Set of Interrogatories and First Request for the Production of Documents for the Purpose of Jurisdictional Discovery dated December 22, 2004 140

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RELEVANT DOCKET ENTRIES

U.S. District Court
United States District Court for the Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:03-cv-03256-RCC-FM

The Permanent Mission of India to The United Nations

Date Filed	#	Docket Text
05/08/2003	1	NOTICE OF REMOVAL from Supreme State Court, County of New York. State Court Case # 401201-03. FILING FEE $ 150.00 RECEIPT # 472930. (JJM) (Entered: 05/12/2003)
		* * *
09/17/2003	7	ANSWER to Complaint by Permanent Mission (Attorney Robert A. Kandel, John J.P. Howley Firm: Kaye, Scholer, LLP). (jco) (Entered: 09/22/2003)
		* * *
10/03/2003		PRETRIAL CONFERENCE held on 10/3/03 before Judge Richard C. Casey. Counsel are present. See transcript. Defendant's request to file a motion to dismiss and stay discovery – decision reserved. (sb) (Entered: 10/10/2003)
		* * *
10/10/2003	9	ORDER, plaintiff is entitled to only limited discovery on the issue of whether jurisdiction exists over defendant. No additional discovery is permitted at this time. An appropriate case management plan accompanies this

Order. (signed by Judge Richard C. Casey); (kw) (Entered: 10/15/2003)

* * *

10/31/2003 11 NOTICE OF MOTION by Permanent Mission for an order dismissing complaint purs to Rule 12(b)(1) of the FRCP; Return Date not indicated (djc) (Entered: 11/04/2003)

10/31/2003 12 MEMORANDUM OF LAW by Permanent Mission in support of [11-1] motion for an order dismissing complaint purs to Rule 12(b)(1) of the FRCP. (djc) (Entered: 11/04/2003)

* * *

12/29/2003 15 AMENDED COMPLAINT FOR FORECLOSURE of TAX LIENS against "Jane Doe #1" through "Jane Doe #20", Great America Leasing Corporation, The Permanent Mission of India to The United Nations. Document filed by The City of New York. (sb,) (Entered: 01/07/2004)

* * *

01/16/2004 18 MOTION (FILED ON SERVICE DATE) to Dismiss the Amended Complt with attached Affdvt of Ruchira Kamboj in Support. (Accepted for Filing by RCC) Document filed by The Permanent Mission of India to The United Nations. (pa,) (Entered: 01/28/2004)

01/20/2004 19 MEMORANDUM OF LAW in Support re: [18] MOTION (FILED ON SERVICE DATE) to Dismiss.. Document

filed by The Permanent Mission of India to The United Nations. (pa,) (Entered: 01/28/2004)

* * *

05/17/2004 21 ORDER this Order disposes of the motion listed at Numbers 11 and 18 of the Clerk's docket for this case. So Ordered. (Signed by Judge Richard C. Casey on 5/14/04) (jco,) (Entered: 05/18/2004)

* * *

03/03/2005 26 MOTION (FILED ON SERVICE DATE) to Dismiss the Amended Complaint in this Action. Document filed by The Permanent Mission of India to The United Nations. (jmi,) (Entered: 03/09/2005)

03/03/2005 27 INDIA'S MEMORANDUM OF LAW in Support re: [26] MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by The Permanent Mission of India to The United Nations. (jmi,) (Entered: 03/09/2005)

03/03/2005 28 AFFIRMATION of Robert Negron, JR. in Support re: [26] MOTION (FILED ON SERVICE DATE) to Dismiss.. Document filed by The Permanent Mission of India to The United Nations. (jmi,) (Entered: 03/09/2005)

03/03/2005 29 PLAINTIFF'S MEMORANDUM OF LAW in Opposition re: [26] MOTION (FILED ON SERVICE DATE) to Dismiss.. Document filed by The City of New York. (jmi,) (Entered: 03/09/2005)

03/03/2005	30	DECLARATION of John R. Low-Beer in Opposition to Defendant's re: [26] MOTION (FILED ON SERVICE DATE) to Dismiss.. Document filed by The City of New York. (jmi,) (Entered: 03/09/2005)
03/03/2005	31	INDIA'S REPLY MEMORANDUM OF LAW in Support of its re: [26] MOTION (FILED ON SERVICE DATE) to Dismiss.. Document filed by The Permanent Mission of India to The United Nations. (jmi,) (Entered: 03/09/2005)

* * *

07/07/2005	34	ORDER denying [26] Motion do Dismiss. The international practice that the immovable-property exception codifies and the legislative history of the FSIA demonstrates that defendants are not entitled to immunity from these claims because the tax liens place their and the City's rights in the Mission properties in issue. Accordingly, the court may exercise jurisdiction under the FSIA to adjudicate the validity of those liens. It is worth emphasizing that this conclusion is not meant to have any impact on the separate question of whether the properties are immune from taxation. The premises may or may not be exempt from taxation; the Court merely holds today that it is empowered to make that determination. Defendants' motions to dismiss for lack of subject matter jurisdiction are therefore denied (Signed by Judge Richard C. Casey on 7/6/05) (yv,)

Additional attachment(s) added on 7/28/2005 (rag,). (Entered: 07/08/2005)

* * *

07/29/2005	35	ANSWER to Amended complaint. Document filed by The Permanent Mission of India to The United Nations. Related document: [15] Amended Complaint filed by The City of New York. Received in night deposit box on 7/29/05 at 5:38 p.m. (db,) (Entered: 08/02/2005)
08/03/2005	36	STIPULATION AND ORDER; defendants' time to answer or move against the Amended Complaint is extended through and including 7/29/05. (Signed by Judge Richard C. Casey on 8/3/05) (sac,) (Entered: 08/05/2005)
08/05/2005	37	NOTICE OF INTERLOCUTORY APPEAL from 34 Order on Motion to Dismiss,,,. Document filed by The Permanent Mission of India to The United Nations. Filing fee $ 255.00, receipt number 551858. Copies of Notice of Interlocutory Appeal mailed to Attorney(s) of Record: NYC Law Department (nd,) (Entered: 08/05/2005)

* * *

U.S. District Court
United States District Court for the
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:03-cv-06086-RCC-FM

The Bayaryn Jargalsaikhan
as principal resident representative to the
United Nations of the Mongolian

Date Filed	#	Docket Text
08/12/2003	1	NOTICE OF REMOVAL from Supreme State Court, County of New York. State Court Case #401200-03. FILING FEE $150.00 RECEIPT # 482144. (laq) (Entered: 08/13/2003)
		* * *
09/17/2003	6	ANSWER to Complaint by The Bayaryn Jargal. (Attorney Robert A. Kandel from the Firm: Kaye, Scholer, LLP). Received in night deposit on 9/17/03. (jco) (Entered: 09/22/2003)
10/03/2003		PRETRIAL CONFERENCE held on 10/3/03 before Judge Richard C. Casey. (ae) (Entered: 11/13/2003)
10/10/2003	7	ORDER, plaintiff is entitled to only limited discovery on the issue of whether jurisdiction exists over defendant. No additional discovery is permitted at this time. An appropriate case management plan accompanies this Order. (signed by Judge Richard C. Casey); (kw) (Entered: 10/15/2003
		* * *

10/31/2003	9	NOTICE OF MOTION (filed on service date) by The Bayaryn Jargal., Jane Doe for an order dismissing the complaint in this action purs to Rule 12(b)(1) of the FRCP; Return Date not indicated; (djc) (Entered: 11/04/2003)
10/31/2003	10	MEMORANDUM OF LAW by The Bayaryn Jargal. in support of [9-1] motion for an order dismissing the complaint in this action purs to Rule 12(b)(1) of the FRCP. (djc) (Entered: 11/04/2003)

* * *

12/29/2003	13	AMENDED COMPLAINT against Jane Doe, The Bayaryn Jargalsaikhan. Document filed by The City of New York. (sb,) (Entered: 01/07/2004)

* * *

01/16/2004	16	MOTION (FILED ON SERVICE DATE) to Dismiss with Attached Affdvt of Gansukh Purevjav in Support of Motion. (Approved for Filing by RCC) Document filed by The Bayaryn Jargalsaikhan. (pa,) Modified on 1/28/2004 (pa,). (Entered: 01/28/2004)
01/20/2004	17	MEMORANDUM OF LAW in Support re: [16] MOTION (FILED ON SERVICE DATE) to Dismiss.. Document filed by The Bayaryn Jargalsaikhan. (pa,) (Entered: 01/28/2004)

* * *

05/17/2004	18	ORDER this order disposes of the motion listed at Numbers 9 and 16 of the Clerk's docket for this case. So Ordered. (Signed by Judge Richard C. Casey on 5/14/04) (jco,) (Entered 05/18/2004)

* * *

02/17/2005	22	MEMORANDUM OF LAW in Support re: [21] MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by The Bayaryn Jargalsaikhan. Received in night deposit box on 2/17/05 at 5:04 p.m. (yv,) (Entered: 04/07/2005)
02/17/2005	23	AFFIRMATION of Robert Negron, Jr. in Support re: [21] MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by The Bayaryn Jargalsaikhan. Received in night deposit box on 2/17/05 at 5:04 p.m. (yv,) (Entered: 04/07/2005)
02/17/2005	24	MEMORANDUM OF LAW in Opposition re: [21] MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by The Bayaryn Jargalsaikhan. Received in night deposit box on 2/17/05 at 5:04 p.m. (yv,) (Entered: 04/07/2005)
02/17/2005	25	DECLARATION of John R. Low-Beer in Opposition re: [21] MOTION (FILED ON SERVICE DATE) to Dismiss. Document filed by The City of New York. Received in night deposit box 2/17/05 at 5:05 p.m. (yv,) (Entered: 04/07/2005)

* * *

07/07/2005	26	MEMORANDUM & ORDER denying [21] Motion to Dismiss. The international practice that the immovable-property exception codifies and the legislative history of the FSIA demonstrate that defendants are not entitled to immunity from these claims because the tax liens place their and the City's rights in the Mission properties in issue. Accordingly, the Court may exercise jurisdiction under the FSIA to adjudicate the validity of those liens. It is worth emphasizing that this conclusion is not meant to have any impact on the separate question of whether the properties are immune from taxation. The premises may or may not be exempt from taxation; the Court merely holds today that it is empowered to make that determination. Defendants' motions to dismiss for lack of subject matter jurisdiction are therefore denied (Signed by Judge Richard C. Casey on 7/6/05) Original entry in 03cv3256 document number 34. (yv,) Additional attachments(s) added on 7/14/2005 (rag,). (Entered: 07/08/2005)

* * *

07/29/2005	27	ANSWER to Amended Complaint. Document filed by Republic of Mongolia. (cd,) (Entered: 08/02/2005)
08/03/2005	29	STIPULATION AND ORDER; defendants' time to answer or move against the Amended Complaint is extended through and including 7/29/05. (Signed by Judge Richard C. Casey on 8/3/05) (sac,) (Entered: 08/05/2005)

08/05/2005)	28	NOTICE OF INTERLOCUTORY APPEAL from 26 Order on Motion to Dismiss,,,. Document filed by The Bayaryn Jargalsaikhan. Filing fee $ 255.00, receipt number E551859. Copies of Notice of Interlocutory Appeal mailed to Attorney(s) of Record: Corporation Counsel. (nd,) (Entered: 08/05/2005)

* * *

US Court of Appeals for the Second Circuit

N.Y.C. v. The Bayaryn Jargal

8/8/05 Copy of notice of appeal and district court docket entries on behalf of APPELLANT Bayaryn Jargal-saikhan, filed. [JC]

10/3/05 Order filed stating: A pre-argument conference having been held herein and the court having been advised as to the progress of these appeals, IT IS HEREBY ORDERED that the appeals be and they hereby are CONSOLIDATED for all purposes. IT IS FURTHER ORDERED that the scheduling order filed in City of New York v. Permanent Mission, 05-4260-cv shall govern the progress of these appeals. {LG} [SG]

* * *

The City of New York v. Permanent Mission

8/8/05 Copy of notice of appeal and district court docket entries on behalf of APPELLANT The Permanent Mission of India to The United Nations, filed. NOTE: Forms C & D Due. [Entry date Aug 15 2005] [SG]

* * *

10/3/05 Order filed stating: A pre-argument conference having been held herein and the court having been advised as to the progress of these appeals, IT IS HEREBY ORDERED that the appeals be and they hereby are CONSOLIDATED for all purposes. IT IS FURTHER ORDERED that the scheduling order filed in City of New York v. Permanent Mission, 05-4260-cv shall govern the progress of these appeals. {LG} [Entry date Oct 4 2005] [SG]

* * *

10/21/05 APPELLANT Bayaryn Jargalsaikhan, The Permanent Mission of India to The United Nations, brief FILED with proof of service. [Entry date Oct 27 2005] [SG]

* * *

11/21/05 APPELLEE The City of New York, brief filed with proof of service. [Entry date Nov 22 2005] [SG]

* * *

12/5/05 APPELLANT Bayaryn Jargalsaikhan, The Permanent Mission of India to The United Nations, reply brief filed with proof of service. [Entry date Dec 6 2005] [SG]

* * *

1/9/06 Letter sent to: Parties requesting response of no more than ten single-spaced pages by 1/20/06, at noon. [Entry date Jan 9 2006] [AV]

* * *

2/23/06 Papers from the U.S. Department of Justice in response to the court's letter dated 1/9/2006, received. [Entry date Feb 24 2006] [SG]

* * *

3/16/06 APPELLEE The City of New York, LETTER BRIEF filed with proof of service. [Entry date Mar 17 2006] [SG]

3/16/06 APPELLANT The Permanent Mission of India to The United Nations, LETTER BRIEF filed with proof of service. [Entry date Mar 21 2006] [SG]

3/23/06 Reply Letter on Behalf of APPELLANT The Permanent Mission of India to The United Nations, received. [Entry date Mar 27 2006] [SG]

4/26/06 Judgment of the district court is Affirmed and Remanded by published signed opinion filed. (RAK) [Entry date Apr 26 2006] [SG]

* * *

5/17/06 Appellant The Permanent Mission of India to The United Nations motion stay the mandate filed with proof of service. [Entry date May 18 2006] [SG]

* * *

6/1/06 Order filed stating: IT IS HEREBY ORDERED that the motion to stay the mandate pending determination of petition for writ of certiorari in Supreme Court ... GRANTED. Before: Hon. RAK, PWH, ERK* {By: AA} [Entry date Jun 1 2006] [SG]

6/1/06 Order FILED GRANTING motion stay the mandate by Appellant The Permanent Mission of India to The United Nations, endorsed on motion dated 5/17/2006. {SEE ORDER DATED 6/1/2006} [Entry date Jun 1 2006] [SG]

* * *

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CITY OF NEW YORK, Plaintiffs, vs. THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, GREAT AMERICA LEASING CORPORATION, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to the plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint. Defendants.	§	03 CV 3256 Judge Martin

NOTICE OF REMOVAL

(Filed May 3, 2003)

TO: United States District Court for the Southern District of New York:

Pursuant to 28 U.S.C. § 1441(d), defendant the Permanent Mission of India to the United Nations ("Permanent Mission of India"), hereby removes this action from the Supreme Court, New York County, to the United States District Court for the Southern District of New York, and alleges as follows:

1. On April 9, 2003, plaintiff filed an action in the Supreme Court, New York County captioned *The City of New York v. The Permanent Mission of India to the United Nations, et al.*, Index No. 03401201. In its complaint, plaintiff asserts a claim pursuant to Title 11 of the Administrative Code of the City of New York ("Administrative Code") allegedly to enforce payment of tax liens held by the City. Complaint ¶ 1.

2. The Permanent Mission of India is a foreign state as defined in 28 U.S.C. § 1603(a). *See, e.g., S & S Machinery Co., v. Masinexportimport*, 802 F. Supp. 1109, 1111 (S.D.N.Y. 1992) (under the FSIA, a diplomatic or consular mission is considered a "foreign state."); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36-37 (1985).

3. Pursuant to 28 U.S.C. § 1441(d), this action may be removed to this Court because:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending.

4. The United States District Court for the Southern District of New York embraces the county in which the state court action is now pending, and thus, this Court is a proper venue for this action pursuant to 28 U.S.C. § 84(a).

5. Subject to and without waiver of defendant's objections to the adequacy of service, copies of all process, pleadings and orders in the state court action are attached to this Notice of Removal.

6. This defendant is filing written notice of this removal with the Clerk of the State Court in which the action is currently pending pursuant to 28 U.S.C. § 1446(d). Copies of the Notice of Filing Notice of Removal, together with this Notice of Removal, are being served upon plaintiffs' counsel pursuant to 28 U.S.C. § 1446(d).

WHEREFORE, the defendant respectfully removes this action from the Supreme Court, New York County, to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441.

DATED this 8 day of May 2003.

Respectfully,
KAYE SCHOLER LLP

By: /s/ Robert A. Kandel
Robert A. Kandel (RK 6120)
John J. P. Howley (JH 9764)

425 Park Avenue
New York, NY 10022
(212) 836-8000

Attorneys for Defendant the Permanent Mission of India

SUPREME COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK

----------X

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, GREAT AMERICA LEASING CORPORATION, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to the plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint.

Defendants.

----------X

NOTICE OF SUIT PURSUANT TO 28 U.S.C. § 1608(a)

Index No. 03401201

NOTICE OF SUIT

1. *Title of Proceeding; Full Name of Court; Case or Docket Number:* The City of New York, Plaintiff, Against The Permanent Mission of India to the United Nations, GreatAmerica Leasing Corporation, and "Jane Doe #1" through "Jane Doe #20", the Names of the Last 20 Defendants Being Unknown to Plaintiff, the Persons or Parties Intended to Be Persons or Corporations, if any, Having or Claiming an Interest in or Lien Upon the Property Described in the Complaint, Defendants. Supreme Court of

the State of New York, County of New York. Index No: 03401201.

2. *Name of Foreign State or Political: Subdivision) Concerned:* The Permanent Mission of India to the United Nations.

3. *Identity of the Other Parties:* The City of New York, a municipal corporation duly organized and existing under the laws of the State of New York, having its principal place of business at City Hall, New York, New York 10007 (Plaintiff); GreatAmerica Leasing Corporation, a foreign corporation having an address at P.O. Box 609, Cedar Rapids, Iowa 52406 (Defendant); and Jane Doe #1 through Jane Doe #20, persons or corporations and other lienors, if any, who may have or claim to have an interest in or lien against the property that is the subject of this suit (Defendants).

JUDICIAL DOCUMENTS

4. *Nature of the Documents Served:* Summons and Verified Complaint.

5. *Nature and Purpose of the Proceeding; Why the Foreign State Has Been Named; Relief Requested:* This legal proceeding relates to the parcel of real property located in the Borough of Manhattan, County of New York, City and State of New York at 235 East 43rd Street, New York, New York 10017 (a parcel also known on the Tax Map of the City of New York as Manhattan Block 1317 Lot 20). The Permanent Mission of India has been named as a defendant in this legal proceeding because it is the owner of record of such property and, as such, is responsible by law for the payment of real property taxes and other real property charges attributable to the property. As set forth in detail in

the Verified Complaint, the Permanent Mission of India has failed to pay taxes assessed against portions of the property used for non-exempt purposes and other charges attributable to the property as a whole, which additionally results in the imposition of statutory interest at a rate of 18% per year and creates tax liens against the property for the outstanding taxes, charges and interest. As of February 1, 2003, the unpaid principal balance for real estate taxes and charges for the property was $4,876,542.20. The statutory interest which has accrued on the unpaid taxes and other charges as of February 1, 2003 was $11,500,159.89. The total outstanding amount of taxes, charges and interest as of February 1, 2003 was $16,376,702.09. The Permanent Mission of India is not immune from liability for such taxes, charges and interest under local, state, federal, or international law. This proceeding is an action seeking foreclosure of the tax liens, a judgment in favor of the City of New York establishing the validity of the tax liens held by the City, a judgment of foreclosure directing that the defendants, including the Permanent Mission of India, pay the City all outstanding real property taxes, charges and interest thereon ($16,376,702.09 as of February 1, 2003) on the parcel of real property referred to above.

6. A response to the Summons and Verified Complaint is required to be submitted to the Court not later than 60 days after these documents are received. The response may present jurisdictional defenses (including defenses relating to state immunity).

7. The failure to submit a timely response with the Court can result in a default judgment and a request for execution to satisfy the judgment. If a default judgment has been entered, a procedure may be available to vacate or open that judgment.

8. Questions relating to state immunities and to the jurisdiction of Courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611 of Title 28 of the United States Code (Pub. L. No. 94-583; 90 Stat. 2891). As required by 22 C.F.R. § 93.2(e), attached is a copy of the Foreign Sovereign Immunities Act of 1976.

Dated: New York, New York
April 2, 2003

MICHAEL A. CARDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445

/s/ Robert J. Paparella
By ROBERT J. PAPARELLA
Assistant Corporation Counsel

To: Permanent Mission of India to the United Nations
750 Third Avenue
New York, New York 10017

GreatAmerica Leasing
P.O. Box 609
Cedar Rapids, Iowa 52406-0609

Ministry of External Affairs
Government of India
Akbar Bhawan, Chanakya Puri
New Delhi – 110 021, INDIA
Attention: Hon. Yashwant Sinha

Index No.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, GREATAMERICA LEASING CORPORATION, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

NOTICE OF SUIT PURSUANT TO 28 U.S.C. § 1608(a)

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Robert J. Paparella
Tel: (212) 788-0445
NYCLIS No.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE PERMANENT MISSION OF INDIA, TO THE UNITED NATIONS, GREATAMERICA LEASING CORPORATION, and "JANE DOE #1" "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or, corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

---------- x

SUMMONS

Index No. 03401201

TO THE ABOVE NAMED DEFENDANTS:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff's attorneys an answer to the verified complaint in this action within sixty (60) days after the service of this summons, exclusive of the day of service, pursuant to 28 U.S.C. § 1608. In case of your failure to answer timely, judgment will be taken against you by default for the relief demanded in the verified complaint.

NEW YORK County is designated as the basis of venue because the real property that is the subject of this

action is situated and located within New York County. The nature of and the relief sought in this action is the foreclosure of tax liens, a Judgment in favor of the City establishing the validity of the tax liens held by the City, a Judgment of Foreclosure directing that the Defendants pay the City all outstanding real property taxes, other charges and interest thereupon, on the parcel of real property located in the Borough of Manhattan, County of New York, City and State of New York, designated on the Tax Map of the City of New York for the Borough of Manhattan as Block 1317 Lot 20 and more fully described in the verified complaint.

Dated: New York, New York
April 2, 2003

MICHAEL A. CARDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445

/s/ Robert J. Paparella
By: ROBERT J. PAPARELLA
Assistant Corporation Counsel

To: Permanent Mission of India to the United Nations
750 Third Avenue
New York, New York 10017

GreatAmerica Leasing
P.O. Box 609
Cedar Rapids, Iowa 52406-0609

Ministry of External Affairs
Government of India
Akbar Bhawan, Chanakya Puri
New Delhi – 110 021, INDIA
Attention: Hon. Yashwant Sinha

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

-against-

THE PERMANENT MISSION OF INDIA, TO THE UNITED NATIONS, GREATAMERICA LEASING CORPORATION, and "JANE DOE #1" "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or, corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

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VERIFIED COMPLAINT FOR FORECLOSURE OF TAX LIENS AND OTHER RELIEF

Index No. 03401201

Plaintiff, the City of New York (the "City"), by its attorney, MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, as and for its Verified Complaint, alleges as follows:

NATURE OF THE ACTION

1. This action is brought pursuant to Title 11 of the Administrative Code of the City of New York ("Admin. Code") to enforce payment of tax liens held by the City. The City seeks a Judgment of Foreclosure establishing the validity of the tax liens held by the City resulting

from real property taxes and other charges and interest thereupon which are due and owing to the City. Section 11-354 provides that the City may maintain an action in the Supreme Court for the enforcement and/or foreclosure of tax liens which remain due and unpaid for at least one year, and for other remedies and procedures provided by law.

2. The following property is the subject of this action: 235 East 43rd Street, New York, New York 10017, a parcel also known on the Tax Map of the City of New York as Manhattan Block 1317 Lot 20 ("Subject Parcel").

3. The subject property is improved with a 26 story residential apartment building containing a gross building area of 87,151 square feet.

4. As of February 1, 2003, the total outstanding amount for real estate taxes, other charges and interest was $16,376,702.09.

5. The Defendant Permanent Mission of India to the United Nations is subject to suit pursuant to Sections § 1605(a)(2) and § 1605(a)(4) of the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1330, 1602-1611.

VENUE

6. Venue is proper in this Court, pursuant to Section 11-335 of the Admin. Code and Section 507 of the New York Civil Practice Law and Rules because the judgment demanded in this action would affect title to, or the possession, use, or enjoyment of, real property situated in the County of New York.

THE PARTIES

7. Plaintiff is a municipal corporation duly organized and existing under the laws of the State of New York, having its principal place of business at City Hall, New York, New York 10007.

8. The Defendant Permanent Mission of India to the United Nations, whose address of record is 750 Third Avenue, New York, New York, 10017, is named as a party-defendant because it is the owner of the Subject Parcel. The Permanent Mission of India to the United Nations acquired title to the Subject Parcel from Second Avenue Commercial, Inc., by deed dated September 8, 1980. The deed was recorded on September 10, 1980 in reel 536, page 1262.

9. GreatAmerica Leasing Corporation, a foreign corporation having an address at P.O. Box 609, Cedar Rapids, Iowa 52406, is named as a party-defendant to bar it from any right, title or interest that it may have in the subject property as the holder of an interest in the property pursuant to UCC-1 Financing Statement No 99PN62032 filed in the City Register's Office of New York County on November 16, 1999.

10. Defendants Jane Doe #1 through Jane Doe #20 are named as party-defendants to represent persons or corporations and other lienors, if any, who may have or claim to have an interest in or lien against the Subject Parcel. Plaintiff will submit the true names and interest of Jane Doe #1 – Jane Doe #20 as and when Plaintiff learns of their true names and interest.

DEFENDANTS' INTERESTS ARE SUBORDINATE

11. Each of the defendants named in this action claims to have or may have some right, title, interest or lien in or to the Subject Parcel or some part thereof, which right, title, interest or lien, if any, is subject and subordinate to the tax liens.

DELINQUENT TAXES AND ASSESSMENTS

12. Taxes, other charges and interest due and owing to the City and the dates on which such taxes and other charges came due are set forth on the following pages:

Manhattan Block 1317 Lot 20

235 East 43rd St., New York, N.Y. 10017

Owner: Permanent Mission of India to the United Nations

Charge Type	Date Due	Principal Amount Due	Interest Amount Due
Sidewalk Repair	08/28/85	$1160.78	$19080.89
Sidewalk Repair	10/28/88	1437.50	16690.26
Additional Real Estate Tax	03/01/91	1017.00	1968.09
Real Estate Tax	07/01/91	147497.95	1040839.66
Real Estate Tax	01/01/92	147497.95	937782.17
Real Estate Tax	07/01/92	170633.10	977122.42
Real Estate Tax	01/01/93	170633.10	877584.37
Elevator Charge	03/28/93	260.00	879.28
Real Estate Tax	07/01/93	230448.04	1064360.33
Real Estate Tax	01/01/94	230448.04	952069.26
Real Estate Tax	07/01/94	221285.31	817274.31

Real Estate Tax	01/01/95	238316.91	783176.85
Elevator Charge	06/28/95	65.00	138.19
Elevator Charge	02/28/1995	195.00	445.37
Real Estate Tax	07/01/95	228053.45	65996.67
Real Estate Tax	01/01/96	228053.45	588461.00
Real Estate Tax	07/01/96	230434.85	523798.33
Real Estate Tax	01/01/97	219094.85	435830.27
Elevator Charge	08/28/97	260.00	327.00
Real Estate Tax	07/01/97	204622.71	354822.65
Real Estate Tax	01/01/98	198603.51	297294.96
Real Estate Tax	07/01/98	200578.90	257494.91
Elevator Charge	12/28/98	260.00	220.55
Real Estate Tax	01/01/99	205503.70	223115.74
Real Estate Tax	07/01/99	206589.21	187508.78
Real Estate Tax	01/01/00	189694.41	140791.63
Elevator Charge	02/28/00	260.00	143.22
Real Estate Tax	07/01/00	198663.22	117743.94
Real Estate Tax	01/01/01	189872.64	86308.00
Real Estate Tax	07/01/01	194777.82	64350.40
Real Estate Tax	01/01/02	192544.50	41397.57
Elevator Charge	03/28/02	260.00	35.20
Real Estate Tax	07/01/02	194421.60	21634.28
Real Estate Tax	01/01/03	233097.70	3473.34

Total Principal Charges: $ 4,876,542.20

Total Interest Charges: $ 11,500,159.89

Grand Total: $ 16,376,702.09

13. As of February 1, 2003, the unpaid principal balance for real estate taxes and other charges for the Subject Parcel was $4,876,542.20 The statutory interest which has accrued on the unpaid taxes and other charges as of February 1, 2003 was $11,500,159.89. The total outstanding amount of taxes, other charges, and interest as of February 1, 2003 was $16,376,702.09.

JUDGMENT DECLARING VALIDITY OF TAX LIENS

14. The City requests that the Court impose a Judgment on the Defendants declaring the validity of the tax liens in the amount outstanding on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338.

JUDGMENT OF FORECLOSURE

15. The City requests that in the event that this action proceeds to a Judgment of Foreclosure on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338, that the Court issue a Judgment directing the Defendant Permanent Mission of India to the United Nations to pay the Plaintiff the amount of real property taxes, other charges and interest cited above, subject to the following:

a. Any state of facts that an inspection of the exempt and/or non-exempt use of the Subject Parcel would disclose;

b. Any state of facts that an accurate survey of the Subject Parcel would show;

c. Any taxes, assessments, emergency repair liens, water and sewer rents and other charges that hereinafter become liens against the property; and

d. Prior liens of record not set forth in this Verified Complaint, if any.

ELECTION OF REMEDIES AND NO WAIVER OF OTHER REMEDIES

16. No other action or proceeding has been commenced or is now pending at law or otherwise to foreclose the tax lien or to recover the debt owed by the Defendant Permanent Mission of India to the United Nations.

17. In the event that the Plaintiff possesses any other liens against the property, either by way of judgment, or otherwise, Plaintiff requests that such other lien(s) shall not be merged in Plaintiff's cause of action set forth in this complaint, but that Plaintiff shall be permitted to enforce said other lien(s) and/or seek determination of priority thereof in any other independent action(s), proceeding(s), including without limitation, any surplus money proceedings.

18. By this action, the City does not waive and reserves its right to commence any additional and supplementary proceedings, procedures or remedies provided by law.

WHEREFORE, Plaintiff demands judgment ordering:

1. That a Judgment in favor of the City establishing the validity of the tax lien in the amount outstanding be entered against the Defendants pursuant to Admin. Code § 11-338;

2. That a Judgment of Foreclosure be entered in favor of the City and against the Defendants directing that

the Defendants pay the amount of taxes, interest and other charges due as set forth above, together with other amounts which would accrue up to the time of such payment and the expenses of the foreclosure, along with costs, including attorneys fees, expense allowances, and disbursements of the action;

3. That the Defendants and each of them and all persons claiming under them or any of them subsequent to the filing of the notice of pendency of this action in the Office of the Clerk of the County of New York, in which County the property is situated, be barred and forever foreclosed of and from all estate, right, interest, claim, or lien, in, to, or on the Subject Parcel and each and every part of it; and

4. That the City have such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 2, 2003

MICHAEL A. CARDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445

/s/ Robert J. Paparella
By: ROBERT J. PAPARELLA
Assistant Corporation Counsel

VERIFICATION

STATE OF NEW YORK)
:SS.:
COUNTY OF NEW YORK)

Sam Miller, being duly sworn, deposes and says that deponent is a Assistant Commissioner with the Finance Department of the City of New York, the Plaintiff herein, that deponent has read the forgoing Verified Complaint and knows the contents hereof; and states the same is true to deponent's own knowledge except as to the matters stated to be alleged upon information and belief, and as to those matters, deponent believes them to be true.

The grounds of deponent's belief as to all matters in the Verified Complaint not stated upon deponent's knowledge, are the official books and records of the City and conversations with employees of the City.

/s/ Sam Miller
Sam Miller
Assistant Commissioner
of Finance

Sworn to before me this
2nd day of April, 2003

/s/ Peter Byrne
NOTARY PUBLIC

PETER BYRNE
Notary Public, State of New York
No. 01BY4608467
Qualified in Queens County
Commission Expires Oct. 31, 2005

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CITY OF NEW YORK, Plaintiffs, -against- THE BAYARYN JARGAL-SAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint, Defendants.	Docket No. 03 CV 6086

NOTICE OF REMOVAL

TO: United States District Court for the Southern District of New York:

Pursuant to 28 U.S.C. § 1441(d), defendant Bayaryn Jargal Saikhan, as Principal Resident Representative to the United Nations of the People's Republic of Mongolia ("The People's Republic of Mongolia"), hereby removes this action from the Supreme Court, New York County, to the

United States District Court for the Southern District of New York, and alleges as follows:

1. On April 9, 2003, plaintiff filed an action in the Supreme Court, New York County captioned *The City of New York v. The Bayaryn Jargal Saikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, et al.,* Index No. 03401200. In its complaint, plaintiff asserts a claim pursuant to Title 11 of the Administrative Code of the City of New York ("Administrative Code") allegedly to enforce payment of tax liens held by the City. Complaint ¶ 1.

2. The People's Republic of Mongolia is a foreign state as defined in 28 U.S.C. § 1603(a). *See, e.g., S & S Machinery Co., v. Masinexportimport,* 802 F. Supp. 1109, 1111 (S.D.N.Y. 1992) (under the FSIA, a diplomatic or consular mission is considered a "foreign state."); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya,* 773 F.2d 31, 36-37 (1985).

3. Pursuant to 28 U.S.C. § 1441(d), this action may be removed to this Court because:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending.

4. The United States District Court for the Southern District of New York embraces the county in which the state court action is now pending, and thus, this Court is a proper venue for this action pursuant to 28 U.S.C. § 84(a).

5. Subject to and without waiver of defendant's objections to the adequacy of service, copies of all process, pleadings and orders in the state court action are attached to this Notice of Removal.

6. This defendant is filing written notice of this removal with the Clerk of the State Court in which the action is currently pending pursuant to 28 U.S.C. § 1446(d). Copies of the Notice of Filing Notice of Removal, together with this Notice of Removal, are being served upon plaintiffs' counsel pursuant to 28 U.S.C. § 1446(d).

WHEREFORE, the defendant respectfully removes this action from the Supreme Court, New York County, to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441.

DATED this 12th day of August 2003.

Respectfully,
KAYE SCHOLER LLP

By: /s/ Robert A. Kandel
Robert A. Kandel (RK 6120)
John J.P. Howley (JH 9764)

425 Park Avenue
New York, NY 10022
(212) 836-8000

Attorneys for Defendant the People's Republic of Mongolia

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGAL-SAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

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SUMMONS

Index No.

(Filed Apr. 09, 2003)

03401200

TO THE ABOVE NAMED DEFENDANTS:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff's attorneys an answer to the verified complaint in this action within sixty (60) days after the service of this summons, exclusive of the day of service, pursuant to 28 U.S.C. §1608. In case of your failure to answer timely, judgment will be taken against you by default for the relief demanded in the verified complaint.

NEW YORK County is designated as the basis of venue because the real property that is the subject of this action is situated and located within New York County. The nature of and the relief sought in this action is the foreclosure of tax liens, a Judgment in favor of the City establishing the validity of the tax liens held by the City, and a Judgment of Foreclosure directing that the Defendants pay the City all outstanding real property taxes, other charges and interest thereupon on the parcel of real property located in the Borough of Manhattan, County of New York, City and State of New York, designated on the Tax Map of the City of New York for the Borough of Manhattan as Block 1391 Lot 68 and more fully described in the verified complaint.

Dated: New York, New York
April 2, 2003

MICHAEL A. CARDOZO
Corporation Counsel of
the City of New York.
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445

/s/ Robert J. Paparella
By: ROBERT J. PAPARELLA
Assistant Corporation Counsel

To: Mongolian People's Republic
6 East 77th Stret
New York, New York 10021

Bayaryn Jargalsaikhan,
Principal Resident Representative to the
United Nations of the People's Republic of Mongolia
6 East 77th Street
New York, New York 10021

Bayaryn Jargalsaikhan,
Principal Resident Representative to the
United Nations of the People's Republic of Mongolia
330 East 46th Street
New York, New York

Ministry of Foreign Affairs
Government of Mongolia
Peace Ave. 7A, Ulaanbaatar
210648 MONGOLIA
Attention: Hon. Luvsangiin Erdenechuluun,

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

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VERIFIED COMPLAINT FOR FORECLOSURE OF TAX LIENS AND OTHER RELIEF

Index No.

Plaintiff, the City of New York (the "City"), by its attorney, MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, as and for its Verified Complaint, alleges as follows:

NATURE OF THE ACTION

1. This action is brought pursuant to Title 11 of the Administrative Code of the City of New York ("Admin. Code") to enforce payment of tax liens held by the City. The City seeks a Judgment of Foreclosure establishing the validity of the tax liens held by the City resulting from

real property taxes and other charges and interest thereupon which are due and owing to the City. Section 11-354 provides that the City may maintain an action in the Supreme Court for the enforcement and/or foreclosure of tax liens which remain due and unpaid for at least one year, and for other remedies and procedures provided by law.

2. The following property is the subject of this action: 6 East 77th Street, New York, New York 10021, a parcel also known on the Tax Map of the City of New York as Manhattan Block 1391 Lot 68 (the "Subject Parcel").

3. The Subject Parcel is improved with an 5 story building containing a gross building area of 10,524 square feet.

4. As of February 1, 2003, the outstanding balance of tax liens for real property taxes, interest and other charges was $2,068,995.00.

5. The Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic is subject to suit pursuant to Sections § 1605(a)(2) and §1605(a)(4) of the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1330, 1602-1611.

VENUE

6. Venue is proper in this Court, pursuant to Section 11-335 of the Admin. Code and Section 507 of the New York Civil Practice Law and Rules because the judgment demanded in this action would affect title to, or the possession, use, or enjoyment of, real property situated in the County of New York.

THE PARTIES

7. Plaintiff is a municipal corporation duly organized and existing under the laws of the State of New York, having its principal place of business at City Hall, New York, New York 10007.

8. The Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, whose address of record is 330 East 46th Street, New York, New York, New York 10017, is named as a party-defendant because it is the

* * *

Charge Type	Date Due	Principal Amount Due	Interest Amount Due
Real Estate Tax	04/01/81	$1611.00	$40696.75
Real Estate Tax	07/01/81	2013.75	49990.57
Real Estate Tax	10/01/81	2013.75	48729.70
Real Estate Tax	01/01/82	2013.75	47468.76
Real Estate Tax	04/01/82	2013.75	46235.21
Real Estate Tax	06/30/82	0.00	1976.71
Real Estate Tax	07/01/82	1733.44	38725.79
Real Estate Tax	10/01/82	1733.44	37746.75
Real Estate Tax	01/01/83	3466.88	73535.65
Real Estate Tax	07/01/83	3746.10	75295.73
Real Estate Tax	01/01/84	3746 10	72260.23
Real Estate Tax	07/01/84	3931.20	72679.78
Real Estate Tax	01/01/85	3931.20	69108.19
Real Estate Tax	07/01/85	3931.20	65594.77
Real Estate Tax	01/01/86	3931.20	62505.77

Real Estate Tax	07/01/86	4272.39	64628.31
Real Estate Tax	01/01/87	4272.39	61271.19
Real Estate Tax	06/30/87	779.21	10575.79
Real Estate Tax	07/01/87	4336.85	58843.47
Real Estate Tax	01/01/88	4336.85	55648.69
Real Estate Tax	07/01/88	4657.00	52818.50
Add. Real Tax	07/01/89	4899.76	51902.85
Real Estate Tax	01/01/90	4899.76	47330.95
Real Estate Tax	02/28/90	106.43	996.78
Real Estate Tax	07/01/90	5101.00	44592.76
Real Estate Tax	03/01/91	82.92	628.89
Real Estate Tax	01/01/91	5101.00	40055.09
Real Estate Tax	07/01/91	5982.94	42219.44
Real Estate Tax	01/01/92	5982.94	38039.14
Real Estate Tax	01/01/88	4336.85	55648.69
Real Estate Tax	07/01/88	4657.00	56363.42
Real Estate Tax	01/01/89	4657.00	52818.50
Real Estate Tax	07/01/89	4899.76	51902.85
Real Estate Tax	01/01/90	4899.76	47330.95
Real Estate Tax	02/28/90	106.43	996.78
Real Estate Tax	07/01/90	5101.00	44592.76
Real Estate Tax	03/01/91	82.92	628.89
Real Estate Tax	01/01/91	5101.00	40055.09
Real Estate Tax	07/01/91	5982.94	42219.44
Real Estate Tax	01/01/92	5982.94	38039.14

Real Estate Tax	07/01/92	6073.26	34778.24
Real Estate Tax	01/01/93	6073.26	31235.43
Real Estate Tax	07/01/93	6444.62	29765.49
Real Estate Tax	01/01/94	6444.62	26625.20
Real Estate Tax	07/01/94	6797.98	25107.02
Real Estate Tax	01/01/95	6506.86	21383.38
Real Estate Tax	07/01/95	6671.70	19483.72
Real Estate Tax	01/01/96	6671.70	17215.42
Additional Real Estate Tax	07/01/96	7072.00	16075
Real Estate Tax	01/01/97	7151.12	14225.23
Real Estate Tax	07/01/97	7218.88	12517.78
Real Estate Tax	01/01/98	7304.54	10934.36
Real Estate Tax	07/01/98	7697.30	9881.48
Real Estate Tax	01/01/99	7856.22	8529.51
Real Estate Tax	07/01/99	8182.22	7426.52
Real Estate Tax	01/01/00	8489.76	6301.12
Real Estate Tax	07/01/00	2084.04	1235.17
Real Estate Tax	01/01/01	2116.88	962.24
Real Estate Tax	07/01/01	2226.46	735.57
Real Estate Tax	01/01/02	2366.50	508.80
Real Estate Tax	07/01/02	2331.14	259.40
Real Estate Tax	01/01/03	2909.03	43.35

Total Principal Charges: $ 230,042.27

Total Interest Charges: $1,838,952.73

Grand Total Charges $2,068,995.00

12. As of February 1, 2003, the unpaid principal balance for taxes and other charges for the Subject Parcel was $230,042.27. The statutory interest which has accrued on the unpaid taxes and other charges as of February 1, 2003 was $1,838,952.73. The total amount outstanding of taxes, other charges, and interest as of February 1, 2003 was $2,068,995.00

JUDGMENT DECLARING VALIDITY OF TAX LIENS

13. The City requests that the Court impose a Judgment on the Defendants declaring the validity of the tax liens in the amount outstanding on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338.

JUDGMENT OF FORECLOSURE

14. The City requests that in the event that this action proceeds to a Judgment of Foreclosure on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338, that the Court issue a Judgment directing the Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, to pay the Plaintiff the amount of real property taxes, other charges and interest cited above, subject to the following:

a. Any state of facts that an inspection of the exempt and/or non-exempt use of the Subject Parcel would disclose;

b. Any state of facts that an accurate survey of the Subject Parcel would show;

c. Any taxes, assessments, emergency repair liens, water and sewer rents and other charges that hereinafter become liens against the property; and

d. Prior liens of record not set forth in this Verified Complaint, if any.

ELECTION OF REMEDIES AND NO WAIVER OF OTHER REMEDIES

15. No other action or proceeding has been commenced or is now pending at law or otherwise to foreclose the tax lien or to recover the debt owed by the Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the People's Republic of Mongolia.

16. In the event that the Plaintiff possesses any other liens against the property, either by way of judgment, or otherwise, Plaintiff requests that such other lien(s) shall not be merged in Plaintiff's cause of action set forth in this complaint, but that Plaintiff shall be permitted to enforce said other lien(s) and/or seek determination of priority thereof in any other independent action(s), proceeding(s), including without limitation, any surplus money proceedings.

17. By this action, the City does not waive and reserves its right to commence any additional and supplementary proceedings, procedures or remedies provided by law.

WHEREFORE, Plaintiff demands judgment ordering:

1. That a Judgment in favor of the City establishing the validity of the tax lien in the amount outstanding be entered against the Defendants;

2. That a Judgment of Foreclosure be entered in favor of the City and against the Defendants directing that the Defendants pay the amount of taxes, interest and other charges due as set forth above, together with other amounts which would accrue up to the time of such payment, as well as the expenses of the foreclosure, along with costs, including attorneys fees, expense allowances, and disbursements of the action;

3. That the Defendants and each of them and all persons claiming under them or any of them subsequent to the filing of the notice of pendency of this action in the Office of the Clerk of the County of New York, in which County the property is situated, be barred and forever foreclosed of and from all estate, right, interest, claim, lien, in, to, or on the Subject Parcel and each and every part of it; and

4. That the City have such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 2, 2003

MICHAEL A. CORDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445
/s/ Robert J. Paparella
ROBERT J. PAPARELLA
Assistant Corporation Counsel

VERIFICATION

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Sam Miller, being duly sworn, deposes and says that deponent is a Assistant Commissioner with the Finance Department of the City of New York, the Plaintiff herein, that deponent has read the forgoing Verified Complaint and knows the contents hereof; and states the same is true to deponent's own knowledge, except as to the matters stated to be alleged upon information and belief, and as to those matters, deponent believes them to be true.

The grounds of deponent's belief as to all matters in the Verified Complaint not stated upon deponent's knowledge are the official books and records of the City and conversations with employees of the City.

/s/ Sam Miller
Sam Miller
Assistant Commissioner
of Finance

Sworn to before me this 2nd
day of April, 2003

/s/ Peter Byrne
NOTARY PUBLIC

PETER BYRNE
Notary Public, State of New York
No. 01BY4608467
qualified in Queens County
Commission Expires Oct. 31, 2001

[Affidavit Of Service Omitted In Printing]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE CITY OF NEW YORK,	**SUMMONS**
Plaintiff,	Index No.
-against-	(Filed Apr. 9, 2003)
THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,	03401200
Defendants.	

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TO THE ABOVE NAMED DEFENDANTS:

PLEASE TAKE NOTICE THAT YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff's attorneys an answer to the verified complaint in this action within sixty (60) days after the service of this summons, exclusive of the day of service, pursuant to 28 U.S.C. §1608. In case of your failure to answer timely, judgment will be taken against you by default for the relief demanded in the verified complaint.

NEW YORK County is designated as the basis of venue because the real property that is the subject of this

action is situated and located within New York County. The nature of and the relief sought in this action is the foreclosure of tax liens, a Judgment in favor of the City establishing the validity of the tax liens held by the City, and a Judgment of Foreclosure directing that the Defendants pay the City all outstanding real property taxes, other charges and interest thereupon on the parcel of real property located in the borough of Manhattan, County of New York, City and State of New York, designated on the Tax Map of the City of New York for the Borough of Manhattan as Block 1391 Lot 68 and more fully described in the verified complaint.

Dated: New York, New York
April 2, 2003

MICHAEL A. CORDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445

/s/ Robert J. Paparella
ROBERT J. PAPARELLA
Assistant Corporation Counsel

To: Mongolian People's Republic
6 East 77th Stret
New York, New York 10021

Bayaryn Jargalsaikhan,
Principal Resident Representative to the
United Nations of the People's Republic of Mongolia
6 East 77th Street
New York, New York 10021

Bayaryn Jargalsaikhan,
Principal Resident Representative to the
United Nations of the People's Republic of Mongolia
330 East 46th Street
New York, New York

Ministry of Foreign Affairs
Government of Mongolia
Peace Ave. 7A, Ulaanbaatar
210648 MONGOLIA
Attention: Hon. Luvsangiin Erdenechuluun,

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

---------- x

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

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VERIFIED COMPLAINT FOR FORECLOSURE OF TAX LIENS AND OTHER RELIEF

Index No.

Plaintiff, the City of New York (the "City"), by its attorney, MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, as and for its Verified Complaint, alleges as follows:

NATURE OF THE ACTION

1. This action is brought pursuant to Title 11 of the Administrative Code of the City of New York ("Admin. Code") to enforce payment of tax liens held by the City. The City seeks a Judgment of Foreclosure establishing the validity of the tax liens held by the City resulting from

real property taxes and other charges and interest thereupon which are due and owing to the City. Section 11-354 provides that the City may maintain an action in the Supreme Court for the enforcement and/or foreclosure of tax liens which remain due and unpaid for at least one year, and for other remedies and procedures provided by law.

2. The following property is the subject of this action: 6 East 77th Street, New York, New York 10021, a parcel also known on the Tax Map of the City of New York as Manhattan Block 1391 Lot 68 (the "Subject Parcel").

3. The Subject Parcel is improved with an 5 story building containing a gross building area of 10,524 square feet.

4. As of February 1, 2003, the outstanding balance of tax liens for real property taxes, interest and other charges was $2,068,995.00.

5. The Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic is subject to suit pursuant to Sections § 1605(a)(2) and §1605(a)(4) of the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1330, 1602-1611.

VENUE

6. Venue is proper in this Court, pursuant to Section 11-335 of the Admin. Code and Section 507 of the New York Civil Practice Law and Rules because the judgment demanded in this action would affect title to, or the possession, use, or enjoyment of, real property situated in the County of New York.

THE PARTIES

7. Plaintiff is a municipal corporation duly organized and existing under the laws of the State of New York, having its principal place of business at City Hall, New York, New York 10007.

8. The Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, whose address of record is 330 East 46th Street, New York, New York, New York 10017, is named as a party-defendant because it is the

* * *

Charge Type	Date Due	Principal Amount Due	Interest Amount Due
Real Estate Tax	04/01/81	$1611.00	$40696.75
Real Estate Tax	07/01/81	2013.75	49990.57
Real Estate Tax	10/01/81	2013.75	48729.70
Real Estate Tax	01/01/82	2013.75	47468.76
Real Estate Tax	04/01/82	2013.75	46235.21
Real Estate Tax	06/30/82	0.00	1976.71
Real Estate Tax	07/01/82	1733.44	38725.79
Real Estate Tax	10/01/82	1733.44	37746.75
Real Estate Tax	01/01/83	3466.88	73535.65
Real Estate Tax	07/01/83	3746.10	75295.73
Real Estate Tax	01/01/84	3746 10	72260.23
Real Estate Tax	07/01/84	3931.20	72679.78
Real Estate Tax	01/01/85	3931.20	69108.19
Real Estate Tax	07/01/85	3931.20	65594.77
Real Estate Tax	01/01/86	3931.20	62505.77

Real Estate Tax	07/01/86	4272.39	64628.31
Real Estate Tax	01/01/87	4272.39	61271.19
Real Estate Tax	06/30/87	779.21	10575.79
Real Estate Tax	07/01/87	4336.85	58843.47
Real Estate Tax	01/01/88	4336.85	55648.69
Real Estate Tax	07/01/88	4657.00	52818.50
Add. Real Tax	07/01/89	4899.76	51902.85
Real Estate Tax	01/01/90	4899.76	47330.95
Real Estate Tax	02/28/90	106.43	996.78
Real Estate Tax	07/01/90	5101.00	44592.76
Real Estate Tax	03/01/91	82.92	628.89
Real Estate Tax	01/01/91	5101.00	40055.09
Real Estate Tax	07/01/91	5982.94	42219.44
Real Estate Tax	01/01/92	5982.94	38039.14
Real Estate Tax	01/01/88	4336.85	55648.69
Real Estate Tax	07/01/88	4657.00	56363.42
Real Estate Tax	01/01/89	4657.00	52818.50
Real Estate Tax	07/01/89	4899.76	51902.85
Real Estate Tax	01/01/90	4899.76	47330.95
Real Estate Tax	02/28/90	106.43	996.78
Real Estate Tax	07/01/90	5101.00	44592.76
Real Estate Tax	03/01/91	82.92	628.89
Real Estate Tax	01/01/91	5101.00	40055.09
Real Estate Tax	07/01/91	5982.94	42219.44
Real Estate Tax	01/01/92	5982.94	38039.14

Real Estate Tax	07/01/92	6073.26	34778.24
Real Estate Tax	01/01/93	6073.26	31235.43
Real Estate Tax	07/01/93	6444.62	29765.49
Real Estate Tax	01/01/94	6444.62	26625.20
Real Estate Tax	07/01/94	6797.98	25107.02
Real Estate Tax	01/01/95	6506.86	21383.38
Real Estate Tax	07/01/95	6671.70	19483.72
Real Estate Tax	01/01/96	6671.70	17215.42
Additional Real Estate Tax	07/01/96	7072.00	16075
Real Estate Tax	01/01/97	7151.12	14225.23
Real Estate Tax	07/01/97	7218.88	12517.78
Real Estate Tax	01/01/98	7304.54	10934.36
Real Estate Tax	07/01/98	7697.30	9881.48
Real Estate Tax	01/01/99	7856.22	8529.51
Real Estate Tax	07/01/99	8182.22	7426.52
Real Estate Tax	01/01/00	8489.76	6301.12
Real Estate Tax	07/01/00	2084.04	1235.17
Real Estate Tax	01/01/01	2116.88	962.24
Real Estate Tax	07/01/01	2226.46	735.57
Real Estate Tax	01/01/02	2366.50	508.80
Real Estate Tax	07/01/02	2331.14	259.40
Real Estate Tax	01/01/03	2909.03	43.35

Total Principal Charges: $ 230,042.27

Total Interest Charges: $1,838,952.73

Grand Total Charges $2,068,995.00

12. As of February 1, 2003, the unpaid principal balance for taxes and other charges for the Subject Parcel was $230,042.27. The statutory interest which has accrued on the unpaid taxes and other charges as of February 1, 2003 was $1,838,952.73. The total amount outstanding of taxes, other charges, and interest as of February 1, 2003 was $2,068,995.00

JUDGMENT DECLARING VALIDITY OF TAX LIENS

13. The City requests that the Court impose a Judgment on the Defendants declaring the validity of the tax liens in the amount outstanding on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338.

JUDGMENT OF FORECLOSURE

14. The City requests that in the event that this action proceeds to a Judgment of Foreclosure on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338, that the Court issue a Judgment directing the Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, to pay the Plaintiff the amount of real property taxes, other charges and interest cited above, subject to the following:

a. Any state of facts that an inspection of the exempt and/or non-exempt use of the Subject Parcel would disclose;

b. Any state of facts that an accurate survey of the Subject Parcel would show;

c. Any taxes, assessments, emergency repair liens, water and sewer rents and other charges that hereinafter become liens against the property; and

d. Prior liens of record not set forth in this Verified Complaint, if any.

ELECTION OF REMEDIES AND NO WAIVER OF OTHER REMEDIES

15. No other action or proceeding has been commenced or is now pending at law or otherwise to foreclose the tax lien or to recover the debt owed by the Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the People's Republic of Mongolia.

16. In the event that the Plaintiff possesses any other liens against the property, either by way of judgment, or otherwise, Plaintiff requests that such other lien(s) shall not be merged in Plaintiff's cause of action set forth in this complaint, but that Plaintiff shall be permitted to enforce said other lien(s) and/or seek determination of priority thereof in any other independent action(s), proceeding(s), including without limitation, any surplus money proceedings.

17. By this action, the City does not waive and reserves its right to commence any additional and supplementary proceedings, procedures or remedies provided by law.

WHEREFORE, Plaintiff demands judgment ordering:

1. That a Judgment in favor of the City establishing the validity of the tax lien in the amount outstanding be entered against the Defendants;

2. That a Judgment of Foreclosure be entered in favor of the City and against the Defendants directing that the Defendants pay the amount of taxes, interest and other charges due as set forth above, together with other amounts which would accrue up to the time of such payment, as well as the expenses of the foreclosure, along with costs, including attorneys fees, expense allowances, and disbursements of the action;

3. That the Defendants and each of them and all persons claiming under them or any of them subsequent to the filing of the notice of pendency of this action in the Office of the Clerk of the County of New York, in which County the property is situated, be barred and forever foreclosed of and from all estate, right, interest, claim, lien, in, to, or on the Subject Parcel and each and every part of it; and

4. That the City have such other and further relief as the Court may deem just and proper.

Dated: New York, New York
April 2, 2003

MICHAEL A. CORDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445
/s/ Robert J. Paparella
ROBERT J. PAPARELLA
Assistant Corporation Counsel

VERIFICATION

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Sam Miller, being duly sworn, deposes and says that deponent is a Assistant Commissioner with the Finance Department of the City of New York, the Plaintiff herein, that deponent has read the forgoing Verified Complaint and knows the contents hereof, and states the same is true to deponent's own knowledge, except as to the matters stated to be alleged upon information and belief, and as to those matters, deponent believes them to be true.

The grounds of deponent's belief as to all matters in the Verified Complaint not stated upon deponent's knowledge are the official books and records of the City and conversations with employees of the City.

/s/ Sam Miller
Sam Miller
Assistant Commissioner
of Finance

Sworn to before me this 2nd
day of April, 2003

/s/ Peter Byrne
NOTARY PUBLIC

PETER BYRNE
Notary Public, State of New York
No. 01BY4608467
Qualified in Queens County
Commission Expires Oct. 31, 2001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to the plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint.

Defendants.

----------X

NOTICE OF SUIT PURSUANT TO 28 U.S.C. § 1608(a)

Index No. 03401200

NOTICE OF SUIT

1. *Title or Proceeding; Full Name of Court; Case or Docket Number:* The City of New York, Plaintiff, Against The Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, The Mongolian People's Republic, and "Jane Doe #1" through "Jane Doe #20", the Names of the Last 20 Defendants Being Unknown to Plaintiff, the Persons or

Parties Intended to Be Persons, or Corporations, if any, Having or Claiming an Interest in or Lien Upon the Property Described in the Complaint, Defendants. Supreme Court of the State of New York, County of New York. Index Number: 03401200.

2. *Name of Foreign State (or Political Subdivision) Concerned:* The Principal Resident Representative to the United Nations of the Mongolian People's Republic (who may otherwise be known as The Permanent Representative of the Permanent Mission of Mongolia to the United Nations) and The Mongolian People's Republic (which may otherwise be known as Mongolia).

3. *Identity of the Other Parties:* The City of New York, a municipal corporation duly organized and existing under the laws of the State of New York, having its principal place of business at City Hall, New York, New York 10007 (Plaintiff) and Jane Doe #1 through Jane Doe #20, persons or corporations and other lienors, if any, who may have or claim to have an interest in or lien against the property that is the subject of this suit (Defendants).

JUDICIAL DOCUMENTS

4. *Nature of the Documents Served:* Summons and Verified Complaint.

5. *Nature and Purpose of the Proceeding; Why the Foreign State Has Been Named; Relief Requested:* This legal proceeding relates to the parcel of real property located in the Borough of Manhattan, County of New York, City and State of New York at 6 East 77th Street, New York, New York 10021 (a parcel also known on the Tax Map of the City of New York as Manhattan Block 1391 Lot

68). The Principal Resident Representative to the United Nations of the Mongolian People's Republic has been named as a defendant in this legal proceeding because such person is the owner of record of the property. The Mongolian People's Republic has been named as a defendant in this legal proceeding because it is designated in the City's tax records as the recipient of tax bills and other communications regarding the property. One or both of these defendants, or the successors-in-interest thereof, is the owner of the property and, as such, is responsible by law for the payment of real property taxes and other real

* * *

8. Questions relating to state immunities and to the jurisdiction of Courts over foreign states are governed by the Foreign Sovereign Immunities Act of 1976, which appears in sections 1330, 1391(f), 1441(d), and 1602 through 1611 of Title 28 of the United States Code (Pub. L. No. 94-583; 90 Stat. 2891). As required by 22 C.F.R. § 93.2(e), attached is a copy of the Foreign Sovereign Immunities Act of 1976.

Dated: New York, New York
April 2, 2003

MICHAEL A. CARDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445

By: /s/ Robert J. Paparella
ROBERT J. PAPARELLA
Assistant Corporation Counsel

To: The Principal Resident Representative
to the United Nations of the People's
Republic of Mongolia
6 East 77th Street
New York, New York 10021

The Principal Resident Representative
to the United Nations of the People's
Republic of Mongolia
330 East 46th Street
New York, New York

Ministry of Foreign Affairs
Government of Mongolia
Peace Ave. 7A, Ulaanbaatar
210648 MONGOLIA
Attention: Hon. Luvsangiin Erdenechuluun,

Index No.

SUPREME COURT OF THE STATE OF NEW YORK –
COUNTY OF NEW YORK

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, THE MONGOLIAN PEOPLE'S REPUBLIC AND "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

NOTICE OF SUIT PURSUANT TO 28 U.S.C. § 1608(a)

MICHAEL A. CARDOZO
Corporation Counsel of the City of New York
Attorney for Defendants
100 Church Street
New York, N.Y. 10007

Of Counsel: Name
Tel: (212) 788-0445
NYCLIS No.

Telephone (212) 725-1808
Fax (212) 953-0988
Corps Diplomatique Associates
Interpreting – Translating
420 Lexington Avenue
Suite 2546
New York, NY 10170

CERTIFICATE OF ACCURACY

State of New York)
)ss:
County of New York)

(Filed Apr. 9, 2003)

I, Enebish, Baasangombo being duly sworn, depose and say that I am a professional translator, associated with Corps Diplomatique Associates, and that I am thoroughly familiar with the Mongolian and English languages and that the attached translation from English into Mongolian

of the "Summons and Verified Complaint" is a true and accurate rendition of the original document in English, to the best of my knowledge and belief.

/s/ Baasangombo Enebish
Translator:
Baasangombo ENEBISH
26 March 2003

Sworn before me on this
27th day of March, 2003.

/s/ Carol E. Post
Notary Public

CAROL E. POST
Notary Public, State of New York
No. 01PO6049301
Qualified in Kings County
Commission Expires Oct. 10, 20026

[LOGO]

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007-2601

MICHAEL A. CARDOZO
Corporation Counsel

(212) 788-0445

April 8, 2003

(Filed Apr. 09, 2003)

Clerk
Supreme Court
New York County

Re: The City of New York v. Bayaryan Jargalsaikhan, As Principal Resident Representative To the United Nations of the Mongolian People's Republic, New York Co. Index No. Law Department NYCLIS No. 03RM000004

Dear Sir or Madam:

Please be advised that, pursuant to CPLR 8017(a), 8018(d)(1), and 8019(d), and pursuant to Section 7-102 of the New York City Administrative Code, the New York City Law Department is exempt from filing and other fees.

Yours truly,

/s/ Robert J. Paparella
Robert J. Paparella
Assistant Corporation Counsel

COUNTY CLERK, NEW YORK COUNTY

Application for INDEX NUMBER pursuant to Section 8018, C.P.L.R.

FEE $185.00

Space below to be TYPED or PRINTED by applicant

INDEX NUMBER
N F
Do not write in this space

TITLE OF ACTION OR PROCEEDING

City of New York
vs.
Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic and "Jane Doe #1" through "Jane Doe #20"

CHECK ONE

☒ COMMERCIAL ACTION	☐ NOT COMMERCIAL ACTION
☐ CONSUMER CREDIT TRANSACTION	☐ NOT CONSUMER CREDIT TRANSACTION
☐ THIRD PARTY ACTION	☐ NOT THIRD PARTY ACTION

IF THIRD PARTY ACTION MAIN INDEX NO. _____

Name and address of Attorney for Plaintiff or Petitioner. Telephone No.

Robert S. Paparella
100 Church St., NY NY

Name and address of Attorney for Defendant or Respondent. Telephone No.

A. Nature and object of action or _____
Nature of special proceeding _____

B. Application for Index Number filed by:
Plaintiff ☐ **Defendant** ☐

C. Was a previous Third Party Action filed
Yes ☐ **No** ☐
Date filed _____

[Affidavit Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

- x

AMENDED COMPLAINT FOR FORECLOSURE OF TAX LIENS AND OTHER RELIEF

Index No.
03 CV 6086 RCC

Plaintiff, the City of New York (the "City"), by its attorney, MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, as and for its Verified Complaint, alleges as follows:

NATURE OF THE ACTION

1. This action is brought pursuant to Title 11 of the Administrative Code of the City of New York ("Admin. Code") to enforce payment of tax liens held by the City.

The City seeks a Judgment of Foreclosure establishing the validity of the tax liens held by the City resulting from real property taxes and other charges and interest thereupon which are due and owing to the City. Section 11-354 provides that the City may maintain an action in the Supreme Court for the enforcement and/or foreclosure of tax liens which remain due and unpaid for at least one year, and for other remedies and procedures provided by law.

2. The following property is the subject of this action: 235 East 43rd Street, New York, New York 10017, a parcel also known on the Tax Map of the City of New York as Manhattan Block 1317 Lot 20 ("Subject Parcel").

3. The Subject Parcel is improved with a 26 story residential apartment building containing a gross building area of 87,151 square feet.

4. As of January 31, 2003, the total outstanding amount for real estate taxes, other charges and interest was $16,376,702.09.

5. As more fully alleged in paragraphs 12 through 19 herein, the Defendant Permanent Mission of India to the United Nations is subject to suit pursuant to Sections §1605(a)(2) and §1605(a)(4) of the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1330, 1602-1611.

VENUE

6. Venue when this action was commended was pleaded pursuant to Section 11-335 of the Admin. Code and Section 507 of the New York Civil Practice Law and Rules because the judgment demanded in this action would affect title to, or the possession, use, or enjoyment

of, real property situated in the County of New York. Venue is now proper in this Court based on removal jurisdiction pursuant to 28 U.S.C. § 1441.

THE PARTIES

7. Plaintiff is a municipal corporation duly organized and existing under the laws of the State of New York, having its principal place of business at City Hall, New York, New York 10007.

8. The Defendant Permanent Mission of India to the United Nations, whose address of record is 750 Third Avenue, New York, New York, 10017, is named as a party-defendant because it is the owner of the Subject Parcel. the Permanent Mission of India to the United Nations acquired title to the Subject Parcel from Second Avenue Commercial, Inc., by deed dated September 8, 1980. The deed was recorded on September 10, 1980 in reel 536, page 1262.

9. Great America Leasing Corporation, a foreign corporation having an address at P.O. Box 609, Cedar Rapids, Iowa 52406, is named as a party-defendant to bar it from any right, title or interest that it may have in the Subject Parcel as the holder of an interest in the Subject Parcel pursuant to UCC-1 Financing Statement No 99PN62032 filed in the city Register's Office of New York County on November 16, 1999.

10. Defendants Jane Doe #1 through Jane Doe #20 are named as party-defendants to represent persons or corporations and other lienors, if any, who may have or claim to have an interest in or lien against the Subject Parcel. Plaintiff will submit the true names and interest of

Jane Doe #1 – Jane Doe #20 as and when Plaintiff learns of their true names and interest.

DEFENDANTS' INTERESTS ARE SUBORDINATE

11. Each of the defendants named in this action claims to have or may have some right, title, interest or lien in or to the Subject Parcel or some part thereof, which right, title, interest or lien, if any, is subject and subordinate to the tax liens.

DELINQUENT TAXES AND ASSESSMENTS

12. Based upon information obtained via inspection of the Subject Parcel by an assessor from the Exemptions Unit at the New York City Department of Finance, the City has determined that the first six floors of the twenty-six floor building were used as offices of India's Mission to the United Nations. The upper floors (seven through twenty six) were used as housing for diplomatic staff.

13. Officials of the Indian Mission have informed the City that the residential portion of the building did not house the residence of the Head of Mission or the Minister Plenipotentiary and that the building has been used for staff housing since it has been occupied in 1991.

14. Under applicable law, only that portion of foreign government-owned property that is used exclusively for the official residence of the resident representative with rank of ambassador or minister plenipotentiary is exempt from real property taxation.

15. Moreover, to the extent that such residential portion of the building is leased to employees, provided as

compensation to employees, offered in consideration of employment, or conferred as a benefit upon employees, use of the Subject Parcel is commercial in nature.

16. Based on inspection and the information provided by the employees of the Indian Mission, that portion of the Subject Parcel used as housing for diplomatic staff were classified as non-exempt for purposes of imposing real property tax assessments.

17. Additionally, under applicable law any other charges assessed constituting service charges are non-exempt.

18. Taxes, other charges and interest due and owing to the City and the dates on which such taxes and other charges came due are set forth on the following pages:

Manhattan Block 1317 Lot 20

235 East 43rd St., New York, N.Y. 10017

Owner: Permanent Mission of India to the United Nations

Charge Type	Date Due	Principal Amount Due	Interest Amount Due
Sidewalk Repair	08/28/85	$1160.78	$19080.89
Sidewalk Repair	10/28/88	1437.50	16690.26
Additional Real Estate Tax	03/01/91	1017.00	1968.09
Real Estate Tax	07/01/91	147497.95	1040839.66
Real Estate Tax	01/01/92	147497.95	937782.17
Real Estate Tax	07/01/92	170633.10	977122.42
Real Estate Tax	01/01/93	170633.10	877584.37
Elevator Charge	03/28/93	260.00	879.28

Real Estate Tax	07/01/93	230448.04	1064360.33
Real Estate Tax	01/01/94	230448.04	952069.26
Real Estate Tax	07/01/94	221285.31	817274.31
Real Estate Tax	01/01/95	238316.91	783176.85
Elevator Charge	06/28/95	65.00	138.19
Elevator Charge	02/28/1995	195.00	445.37
Real Estate Tax	07/01/95	228053.45	65996.67
Real Estate Tax	01/01/96	228053.45	588461.00
Real Estate Tax	07/01/96	230434.85	523798.33
Real Estate Tax	01/01/97	219094.85	435830.27
Elevator Charge	08/28/97	260.00	327.00
Real Estate Tax	07/01/97	204622.71	354822.65
Real Estate Tax	01/01/98	198603.51	297294.96
Real Estate Tax	07/01/98	200578.90	257494.91
Elevator Charge	12/28/98	260.00	220.55
Real Estate Tax	01/01/99	205503.70	223115.74
Real Estate Tax	07/01/99	206589.21	187508.78
Real Estate Tax	01/01/00	189694.41	140791.63
Elevator Charge	02/28/00	260.00	143.22
Real Estate Tax	07/01/00	198663.22	117743.94
Real Estate Tax	01/01/01	189872.64	86308.00
Real Estate Tax	07/01/01	194777.82	64350.40
Real Estate Tax	01/01/02	192544.50	41397.57
Elevator Charge	03/28/02	260.00	35.20

Real Estate Tax	07/01/02	194421.60	21634.28
Real Estate Tax	01/01/03	233097.70	3473.34

Total Principal Charges: $ 4,876,542.20

Total Interest Charges: $ 11,500,159.89

Grand Total: $ 16,376,702.09

19. As of January 31, 2003, the unpaid principal balance for real estate taxes and other charges for the Subject Parcel was $4,876,542.20. The statutory interest which has accrued on the unpaid taxes and other charges as of January 31, 2003 was $11,500,159.89. The total outstanding amount of taxes, other charges, and interest as of January 31, 2003 was $16,376,702.09

JUDGMENT DECLARING VALIDITY OF TAX LIENS

20. The City requests that the court impose a Judgment on the Defendants declaring the validity of the tax liens in the amount outstanding on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338.

JUDGMENT OF FORECLOSURE

21. The City requests that in the event that this action proceeds to a Judgment of Foreclosure on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338, that the Court issue a Judgment directing the Defendant Permanent Mission of India to the United Nations to pay the Plaintiff the amount of real property taxes, other charges and interest cited above, subject to the following:

a. Any state of facts that an inspection of the exempt and/or non-exempt use of the Subject Parcel would disclose;

b. Any state of facts that an accurate survey of the Subject Parcel would show;

c. Any taxes, assessments, emergency repair liens, water and sewer rents and other charges that hereinafter become liens against the Subject Parcel; and

d. Prior liens of record not set forth in this Verified Complaint, if any.

ELECTION OF REMEDIES AND NO WAIVER OF OTHER REMEDIES

22. No other action or proceeding has been commenced or is now pending at law or otherwise to foreclose the tax lien or to recover the debt owed by the Defendant Permanent Mission of India to the United Nations.

23. In the event that the Plaintiff possesses any other liens against the Subject Parcel, either by way of judgment, or otherwise, Plaintiff requests that such other lien(s) shall not be merged in Plaintiff's cause of action set forth in this complaint, but that Plaintiff shall be permitted to enforce said other lien(s) and/or seek determination of priority thereof in any other independent action(s), proceeding(s), including without limitation, any surplus money proceedings.

24. By this action, the City does not waive and reserves its right to commence any additional and supplementary proceedings, procedures or remedies provided by law.

WHEREFORE, Plaintiff demands judgment ordering:

1. That a Judgment in favor of the City establishing the validity of the tax lien in the amount outstanding be entered against the Defendants pursuant to Admin. Code § 11-338;

2. That a Judgment of Foreclosure be entered in favor of the City and against the Defendants directing that the Defendants pay the amount of taxes, interest and other charges due as set forth above, together with other amounts which would accrue up to the time of such payment and the expenses of the foreclosure, along with costs, including attorneys fees, expense allowances, and disbursements of the action;

3. That the Defendants and each of them and all persons claiming under them or any of them subsequent to the filing of the notice of pendency of this action in the Office of the Clerk of the County of New York, in which County the Subject Parcel is situated, be barred and forever foreclosed of and from all estate, right, interest, claim, or lien, in, to, or on the Subject Parcel and each and every part of it; and

4. That the City have such other and further relief as the Court may deem just and proper.

Dated: New York, New York
December 23, 2003

MICHAEL A. CORDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445

/s/ Robert J. Paparella
By: ROBERT J. PAPARELLA
Assistant Corporation Counsel

TO: Kaye Scholer LLP
ATTN: John J.P. Howley, Esq.
Robert Kandel, Esq.
Attorneys for Defendant
4265 Park Ave.
New York, NY 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

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AMENDED COMPLAINT FOR FORECLOSURE OF TAX LIENS AND OTHER RELIEF

Index No.
03 CV 6086 RCC

Plaintiff, the City of New York (the "City"), by its attorney, MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, as and for its Verified Complaint, alleges as follows:

NATURE OF THE ACTION

1. This action is brought pursuant to Title 11 of the Administrative Code of the City of New York ("Admin. Code") to enforce payment of tax liens held by the City. The City seeks a Judgment of Foreclosure establishing the validity of the tax liens held by the City resulting from

real property taxes and other charges and interest thereupon which are due and owing to the City. Section 11-354 provides that the City may maintain an action in the Supreme Court for the enforcement and/or foreclosure of tax liens which remain due and unpaid for at least one year, and for other remedies and procedures provided by law.

2. The following property is the subject of this action: 6 East 77th Street, New York, New York 10021, a parcel also known on the Tax Map of the City of New York as Manhattan Block 1391 Lot 68 (the "Subject Parcel" or the "Subject").

3. The Subject Parcel is improved with an 6 story building containing a gross building area of 10,524 square feet.

4. As of January 31, 2003, the outstanding balance of tax liens for real property, taxes, interest and other charges was $2,068,995.00.

5. As more fully alleged in paragraphs 11 through 17, the Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic is subject to suit pursuant to Sections §1605(a)(2) and §1605(a)(4) of the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1330, 1602-1611.

VENUE

6. Venue when this action was commenced was pleaded pursuant to Section 11-335 of the Admin. Code and Section 507 of the New York Civil Practice Law and Rules because the judgment demanded in this action would affect

title to, or the possession, use, or enjoyment of, real property situated in the County of New York. Venue is now proper also in this Court based on removal jurisdiction pursuant to 28 U.S.C. § 1441.

THE PARTIES

7. Plaintiff is a municipal corporation duly organized and existing under the laws of the State of New York, having its principal place of business at City Hall, New York, New York 10007.

8. The Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, whose address of record is 330 East 46th Street, New York, New York, New York, 10017, is named as a party-defendant because it is the owner of the Subject Parcel. The Defendant acquired title to the Subject Parcel from the Ecko Products Company by deed dated April 11, 1962. The deed was recorded on April 19, 1962 in Liber 5184CP37.

9. Defendants Jane Doe #1 through Jane Doe #20 are named as party-defendants to represent persons or corporations and other lienors, if any, who may have or claim to have an interest in or lien against the Subject Parcel. Plaintiff will submit the true names and interest of Jane Doe #1 through Jane Doe #20 as and when Plaintiff learns of their true names and interest.

DEFENDANTS' INTERESTS ARE SUBORDINATE

10. Each of the defendants named in this action claims to have or may have some right, title, interest or lien in or to the Subject Parcel or some part thereof, which

right, title, interest or lien, if any, is subject and subordinate to the tax liens.

DELINQUENT TAXES AND ASSESSMENTS

11. Based upon information obtained via inspection of the Subject Parcel by an assessor from the Exemptions Unit at the New York City Department of Finance and acknowledgments of employees of the Mongolian Mission, the City determined that the first two floors of the six story building were used as offices of Mongolia's Mission to the United Nations. The third floor contained the residence of the Ambassador to the United Nations. The fourth and fifth floors were used as housing for staff.

12. Under applicable law, only that portion of foreign-owned government property that is used exclusively for the official residence of the resident representative with rank of ambassador or minister plenipotentiary is exempt from real property taxation.

13. To the extent that such residential portion of the building is leased to employees, provided as compensation to employees, offered in consideration of employment, or conferred as a benefit upon employees, use of the property is commercial in nature.

14. Based on inspections, the City classified that portion of the Subject Parcel used as housing for diplomatic staff non-exempt for purposes of imposing real property tax assessments.

15. Additionally, under applicable law any other charges assessed constituting service charges are non-exempt.

16. Taxes, other charges and interest due and owing to the City and the dates on which such taxes and other charges came due are set forth below:

Manhattan Block 1391 Lot 68

6 East 77th Street, Street, New York, N.Y. 10021

Owner: Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the People's Republic of Mongolia

Charge Type	Date Due	Principal Amount Due	Interest Amount Due
Real Estate Tax	07/01/80	$880.98	$32699.57
Real Estate Tax	10/01/80	5175.00	41164.50
Real Estate Tax	01/01/81	1611.00	41393.33
Real Estate Tax	04/01/81	1611.00	40696.75
Real Estate Tax	07/01/81	2013.75	49990.57
Real Estate Tax	10/01/81	2013.75	48729.70
Real Estate Tax	01/01/82	2013.75	47468.76
Real Estate Tax	04/01/82	2013.75	46235.21
Real Estate Tax	06/30/82	0.00	1976.71
Real Estate Tax	07/01/82	1733.44	38725.79
Real Estate Tax	10/01/82	1733.44	37746.75
Real Estate Tax	01/01/83	3466.88	73535.65
Real Estate Tax	07/01/83	3746.10	75295.73
Real Estate Tax	01/01/84	3746.10	72260.23
Real Estate Tax	07/01/84	3931.20	72679.78
Real Estate Tax	01/01/85	3931.20	69108.19

Real Estate Tax	07/01/85	3931.20	65594.77
Real Estate Tax	01/01/86	3931.20	62505.77
Real Estate Tax	07/01/86	4272.39	64628.31
Real Estate Tax	01/01/87	4272.39	61271.19
Real Estate Tax	06/30/87	779.21	10575.79
Real Estate Tax	07/01/87	4336.85	58843.47
Real Estate Tax	01/01/88	4336.85	55648.69
Real Estate Tax	07/01/88	4657.00	52818.50
Add. Real Tax	07/01/89	4899.76	51902.85
Real Estate Tax	01/01/90	4899.76	47330.95
Real Estate Tax	02/28/90	106.43	996.78
Real Estate Tax	07/01/90	5101.00	44592.76
Real Estate Tax	03/01/91	82.92	628.89
Real Estate Tax	01/01/91	5101.00	40055.09
Real Estate Tax	07/01/91	5982.94	42219.44
Real Estate Tax	01/01/92	5982.94	38039.14
Real Estate Tax	01/01/88	4336.85	55648.69
Real Estate Tax	07/01/88	4657.00	56363.42
Real Estate Tax	01/01/89	4657.00	52818.50
Real Estate Tax	07/01/89	4899.76	51902.85
Real Estate Tax	01/01/90	4899.76	47330.95
Real Estate Tax	02/28/90	106.43	996.78
Real Estate Tax	07/01/90	5101.00	44592.76
Real Estate Tax	03/01/91	82.92	628.89

Real Estate Tax	01/01/91	5101.00	40055.09
Real Estate Tax	07/01/91	5982.94	42219.44
Real Estate Tax	01/01/92	5982.94	38039.14
Real Estate Tax	07/01/92	6073.26	34778.24
Real Estate Tax	01/01/93	6073.26	31235.43
Real Estate Tax	07/01/93	6444.62	29765.49
Real Estate Tax	01/01/94	6444.62	26625.20
Real Estate Tax	07/01/94	6797.98	25107.02
Real Estate Tax	01/01/95	6506.86	21383.38
Real Estate Tax	07/01/95	6671.70	19483.72
Real Estate Tax	01/01/96	6671.70	17215.42
Additional Real Estate Tax	07/01/96	7072.00	16075
Real Estate Tax	01/01/97	7151.12	14225.23
Real Estate Tax	07/01/97	7218.88	12517.78
Real Estate Tax	01/01/98	7304.54	10934.36
Real Estate Tax	07/01/98	7697.30	9881.48
Real Estate Tax	01/01/99	7856.22	8529.51
Real Estate Tax	07/01/99	8182.22	7426.52
Real Estate Tax	01/01/00	8489.76	6301.12
Real Estate Tax	07/01/00	2084.04	1235.17
Real Estate Tax	01/01/01	2116.88	962.24
Real Estate Tax	07/01/01	2226.46	735.57
Real Estate Tax	01/01/02	2366.50	508.80

Real Estate Tax	07/01/02	2331.14	259.40
Real Estate Tax	01/01/03	2909.03	43.35

Total Principal Charges: $ 230,042.27

Total Interest Charges: $1,838,952.73

Grand Total Charges $2,068,995.00

17. As of January 31, 2003, the unpaid principal balance for taxes and other charges for the Subject Parcel was $230,042.27. The statutory interest which has accrued on the unpaid taxes and other charges as of January 31, 2003 was $1,838,952.73. The total amount outstanding of taxes, other charges, and interest as of January 31, 2003 was $2,068,995.00.

JUDGMENT DECLARING VALIDITY OF TAX LIENS

18. The City requests that the court impose a Judgment on the Defendants declaring the validity of the tax liens in the amount outstanding on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338.

JUDGMENT OF FORECLOSURE

19. The City requests that in the event that this action proceeds to a Judgment of Foreclosure on the Subject Parcel pursuant to Admin. Code § 11-354 and § 11-338, that the Court issue a Judgment directing the Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian Peoples Republic, to pay the Plaintiff the amount of real property taxes, other charges and interest cited above, subject to the following:

a. Any state of facts that an inspection of the exempt and/or non-exempt use of the Subject Parcel would disclose;

b. Any state of facts that an accurate survey of the Subject Parcel would show;

c. Any taxes, assessments, emergency repair liens, water and sewer rents and other charges that hereinafter become liens against the Subject Parcel; and

d. Prior liens of record not set forth in this Verified Complaint, if any.

ELECTION OF REMEDIES AND NO WAIVER OF OTHER REMEDIES

20. No other action or proceeding has been commenced or is now pending at law or otherwise to foreclose the tax lien or to recover the debt owed by the Defendant Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the People's Republic of Mongolia.

21. In the event that the Plaintiff possesses any other liens against the Subject Parcel, either by way of judgment, or otherwise, Plaintiff requests that such other lien(s) shall not be merged in Plaintiff's cause of action set forth in this complaint, but that Plaintiff shall be permitted to enforce said other lien(s) and/or seek determination of priority thereof in any other independent action(s), proceeding(s), including without limitation, any surplus money proceedings.

22. By this action, the City does not waive and reserves its right to commence any additional and supplementary proceedings, procedures or remedies provided by law.

WHEREFORE, Plaintiff demands judgment ordering:

1. That a Judgment in favor of the City establishing the validity of the tax lien in the amount outstanding be entered against the Defendants;

2. That a Judgment of Foreclosure be entered in favor of the City and against the Defendants directing that the Defendants pay the amount of taxes, interest and other charges due as set forth above, together with other amounts which would accrue up to the time of such payment, as well as the expenses of the foreclosure, along with costs, including attorneys fees, expense allowances, and disbursements of the action;

3. That the Defendants and each of them and all persons claiming under them or any of them subsequent to the filing of the notice of pendency of this action in the Office of the Clerk of the County of New York, in which County the Subject Parcel is situated, be barred and forever foreclosed of and from all estate, right, interest, claim, or lien, in, to, or on the Subject Parcel and each and every part of it; and

4. That the City have such other and further relief as the Court may deem just and proper.

Dated: New York, New York
December 22, 2003

MICHAEL A. CORDOZO
Corporation Counsel of
the City of New York
Attorney for the Plaintiff
100 Church Street
Room 5-216
New York, N.Y. 10007
(212) 788-0445

/s/ Robert J. Paparella
By: ROBERT J. PAPARELLA
Assistant Corporation Counsel

To: Kaye Scholer LLP
ATTN: John J.P. Howley, Esq.
Robert Kandel, Esq.
Attorneys for Defendant
425 Park Ave.
New York, NY 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, et al.,

Defendants.

No. 03 CV 3256 RCC

AFFIRMATION OF ROBERT NEGRON, JR.

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ROBERT NEGRON, JR., under penalty of perjury, affirms and says:

1. I am an associate with the law firm of Kaye Scholer LLP, counsel for defendant The Permanent Mission of India to the United Nations in this action, and am personally familiar with the matters set forth herein.

2. I submit this affirmation in support of Defendants' Motion To Dismiss The Amended Complaint For Lack Of Subject Matter Jurisdiction.

3. Attached hereto as Exhibits A-C are copies of documents cited in Defendant's Memorandum Of Law In Support Of Its Motion To Dismiss The Amended Complaint For Lack Of Subject Matter Jurisdiction:

Document	**Ex.**
Plaintiffs Amended Complaint	A
Affidavit of Ruchira Kamboj	B

India's Second Supplemental Response
To Plaintiff's First Set Of Interrogatories
And First Request For The Production
Of Documents For The Purpose Of
Jurisdictional Discovery C

Dated: New York, New York
January 10, 2005

KAYE SCHOLER LLP

By: /s/ Robert Negron, Jr.
Robert A. Kandel (RK-6120)
John J.P. Howley (JH-9764)
Robert Negron, Jr. (RN-0276)
Attorneys for Defendant
425 Park Avenue
New York, New York 10022
(212) 836-8000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

-against-

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, et al.,

Defendants.

No. 03 CV 3256 RCC

AFFIDAVIT OF RUCHIRA KAMBOJ IN SUPPORT OF MOTION TO DISMISS

---------- x

RUCHIRA KAMBOJ, being duly sworn, deposes and says:

1. I am an employee of the Ministry of External Affairs of the Republic of India (the "Ministry") serving as Counsellor and Head of Chancery posted to the Permanent Mission of India to the United Nations (the "Mission"). I am personally familiar with the matters set forth herein.

2. My office is located within the Mission located at 235 East 43rd Street, New York, NY, as is my residence which I share with my family. I am in the United States on a "G-1" visa which is issued by the United States Department of State to diplomatic personnel assigned by their home state to the United Nations.

3. Construction of the Mission started in June 1989. The first six floors, basement and cellar of the Mission consist of diplomatic offices and accessory space. The remainder of the Mission, floors seven through twenty-six, consists of residential units, mechanical space and accessory

uses. Diplomats and staff began to occupy the Mission starting in January 1993.

4. Within the Mission a total of sixteen (16) diplomats and their families occupy the sixteen apartments within the building. The attached chart, Exhibit A, prepared at my direction, identifies each diplomat who has lived in these units with his or her family from January 1993 to date. The chart also notes the diplomat's title and his or her visa status. As noted, "G-1" visas are assigned to diplomats serving at the United Nations. "A-1" visas are assigned to diplomatic members of the Indian consulate.

5. Since January 1993 quarters for security personnel and a driver have been provided on the seventh floor of the Mission. These staff members also hold G-1 visas.

6. The Ministry, for its convenience and in accordance with law as noted below, provides housing within the Mission to certain senior level diplomats and security personnel posted to the United Nations and to the consular office for several key reasons, among others. First, given the time difference between the Mission and the Ministry in New Delhi, India, the diplomats at the Mission must be available, day and night, to address inquiries and communications from the Ministry as well as to transmit reports about developments at the United Nations to the Ministry. Second, the housing of personnel within the Mission fosters a greater concentration of attention by the diplomats and staff on matters pertinent to the Ministry. Third, the Ministry expects senior diplomats with residences within the Mission to use their residences to promote the overall interests of the Republic of India by entertaining and socializing with their diplomatic colleagues from other nations and with other persons who

might advance India's interests. Similarly, the location of these residences within the Mission facilitates participation by the diplomats and their families in social and cultural events hosted by the Mission to promote the government's interests. Fourth, having senior personnel living within the Mission facilitates providing security to all concerned. Fifth, the provision of housing at the Mission facilitates a more efficient transition between incoming and outgoing senior diplomats and their families by simplifying the logistics of relocating to the United States from India.

7. Housing within the Mission is provided to the diplomats quartered there without payment of any rent. In fact, as it is required to do by Indian law, the Ministry pays all costs of providing such housing. Attached as Exhibit B is the *Handbook of Rules and Regulations Relating to the Indian Foreign Service. Part-1, Indian Foreign Service (Pay, Leave, Compensatory Allowances and other Conditions of Service) Rules, 1961, (As Amended).* These regulations, which have the force of law, state "When serving outside India, an officer [of the Ministry] shall be entitled, subject to such conditions as may be prescribed by the Government, free of charge, to furnished residential accommodation in accordance with the subsequent provisions of this Annexure." Exhibit B at page 110. The provision of such housing to a diplomat (an officer of the Ministry) is not considered to be compensation to the diplomat.

Dated: New York, New York
January 15, 2004

/s/ Ruchira Kamboj
Ruchira Kamboj

Sworn to before me on this
15 day of January 2004

/s/ Robert A. Kandel
Notary Public

ROBERT A. KANDEL
Notary Public, State of New York
No. 02KA4521595
Qualified in Westchester County
Commission Expires June 30, 2006

———

PERMANENT MISSION OF INDIA TO THE UNITED NATIONS
235 EAST 43RD STREET
NEW YORK, NEW YORK 10017
ROSTER OF RESIDENTS – JANUARY 1993 TO DATE

Apartment No.	Name of the resident	Designation	Period	Visa Status
Apt. 26/25	Mr. A.S. Punia with family	Minister	Jan. 93-Mar. 96	A1
	Mr. N. Louvem with family	Counsellor	Mar. 96-June 99	A1
	Mr. R.V. Warjri with family	Minister	June 99-Aug. 02	A1
	Mr. Ashok Tomar with family	Minister	Aug. 02-till date	A1
Apt. 23/24	Mrs. Mitra Vashishth with family	Minister	Jan. 93-June 96	G1
	Mr. Rajat Saha with family	Minister	Aug. 96-Aug. 99	G1
	Mr. A.K. Bhattacharjee with family	Minister	Aug. 99-Mar. 02	G1
	Mr. B.S. Bishnoi with family	Counsellor	Mar. 02-till date	G1
Apt. 22/23	Mr. S.C. Mehra with family	Counsellor	Jan. 93-May 94	G1
	Mr. P.V. Kumar with family	Minister	May 94-July 98	G1
	Mr. V.K. Tiwathia with family	Minister	July 98-July 02	G1
	Mr. H.V. Shringla with family	Counsellor	July 02-till date	G1
Apt. 21	Mr. R. Vishawanathan with family	Minister	Jan. 93-April 96	G1
	Mr. A. Manickam with family	Counsellor	Apr. 96-Aug. 99	G1
	Mr. S.C. Mehta with family	Counsellor	Aug. 99-Aug. 02	G1
	Mr. Jaideep Mazumdar with family	Counsellor	Aug. 02-till date	G1

Apt. 20	Mr. Suresh K. Goel with family	First Secretary	Jan. 93-June 96	G1
	Mr. V. Narayanan with family	Attache	May 98-June 99	G1
	Mr. R.C. Joshi with family	First Secretary	June 99-Aug. 02	G1
	Mr. R.K. Chawla with family	Second Secretary	Aug. 02-till date	G1
Apt. 19	Mr. Nikhil Seth with family	Counsellor	Jan. 93-Sept. 93	G1
	Mr. Arun K. Singh with family	Counsellor	Sept. 93-Dec. 97	G1
	Mrs. Nandini K. Iyer with family	Counsellor	Dec. 97-June 00	G1
	Mrs. Vijay T. Singh with family	Counsellor	June 00-July 03	G1
	Mr. Alok K. Sinha with family	Counsellor	July 03-till date	G1
Apt. 18	Mr. Ranjit Rae	Counsellor	Jan. 93-Feb. 94	G1
	Mr. V.K. Gokhale with family	Counsellor	Feb. 94-July 98	G1
	Mr. Atul Khare with family	Counsellor	July 98-Jan. 01	G1
	Mr. B.S. Bishnoi with family	Counsellor	Jan. 01-Mar. 02	G1
	Mrs. Mukta D. Tomar with family	Counsellor	Mar. 02-Aug. 02	G1
	Mr. Amreet Ahluwalia with family	Counsellor	Dec. 03-till date	G1
Apt. 17	Mr. S.R. Chinoy with family	First Secretary	Jan. 93-May 95	G1
	Mr. Syed Akbaruddin with family	First Secretary	May 95-Sept. 98	G1
	Mr. Y.K. Sinha with family	Counsellor	Sept. 98-Mar. 02	G1
	Mrs. Ruchira Kamboj with family	Counsellor	Mar. 02-till date	G1

Apt. 16	Kum M. Manimekali	First Secretary	Jan. 93-Feb. 96	G1
	Mr. G. Mukhopadhyay with family	Counsellor	Feb. 96-June 99	G1
	Dr. AVS Rameshchandra with family	First Secretary	June 99-July 02	G1
	Mr. Sanjiv Ranjan with family	First Secretary	Apr. 03-till date	G1
Apt. 15	Mr. S.C. Chaturvedi with family	First Secretary	Jan. 93-Dec. 94	G1
	Dr. S. Rama Rao with family	First Secretary	Dec. 94-Aug. 98	G1
	Mr. Narinder Singh with family	First Secretary	Sept. 98-Apr. 02	G1
	Dr. M. Gandhi with family	Counsellor	May 02-till date	G1
Apt. 14	Mr. Rahul Kulshreshtha with family	Second Secretary	July 93-Feb. 97	A1
	Mr. Anil K. Sharan with family	Second Secretary	Feb. 97-Feb. 00	A1
	Mr. HVS Manral with family	Minister	Feb. 00-May 03	A1
	Mr. Joginder Pal with family	Second Secretary	May 03-till date	A1
Apt. 13	Mr. S.M. Trehan with family	Second Secretary	Jan. 93-Jan. 94	A1
	Mr. T.D. Aggarwal with family	Second Secretary	Jan. 94-July 97	A1
	Mr. Sohan Prakash with Family	First Secretary	July 97-Dec. 00	A1
	Mr. Santosh Jha with family	First Secretary	Dec. 00-till date	A1
Apt. 12	Mr. V.V.S. Subba Rao with family	Second Secretary	Jan. 93-Jan. 96	A1
	Mr. Sonam Wangdus with family	Second Secretary	Jan. 96-Aug. 99	A1
	Mr. A.S. Bajpai with family	Second Secretary	Aug. 99-Jan. 03	A1
	Mr. Vinod Bhandari with family	Second Secretary	Jan. 93-till date	A1

Apt. 11	Mr. A.K. Trigunayat with family	Second Secretary	Jan. 93-Mar. 96	A1
	Mr. M.L. Gilautra with family	Second Secretary	Mar. 96-Oct. 97	A1
	Mr. D.K. Paliwal with family	Second Secretary	Oct. 97-June 02	A1
	Mr. R.N. Panda with family	Second Secretary	June 02-till date	A1
Apt. 10	Mr. S. Sudarsanam with family	Second Secretary	Jan. 93-Dec. 94	A1
	Mr. Vishnu Prakash with family	Second Secretary	Dec. 94-July 96	A1
	Mr. A.S. Toor with family	First Secretary	July 96-June 01	A1
	Mr. Rattan Singh with family	First Secretary	June 01-till date	A1
Apt. 8/9	Mr. I.K. Raina with family	Second Secretary	Jan. 93-Jan. 96	A1
	Mrs. Vaneja Kumari with family	Attache	Jan. 96-June 99	G1
	Mr. Anil Saxena with family	Attache	Aug. 99-Oct. 02	G1
	Mr. A.S. Takhi with family	Attache	Oct. 02-till date	G1
Apt. 7-A	Mr. Manohar Lal	Chauffeur	July 93-July 95	G1
	Mr. Tilak Raj	Chauffeur	July 95-Nov. 98	G1
	Mr. K.C.S. Nair	Chauffeur	Nov. 98-Jan. 02	G1
	Mr. Manmohan Singh	Chauffeur	Jan. 02-till date	G1
Apt. 7-B	Mr. Satyawan Singh	SG	June 93-Nov. 95	G1
	Mr. Bijender Singh	SG	Nov. 95-Mar. 98	G1
	Mr. V. Krishan Kumar	SG	Mar. 98-Mar. 00	G1
	Mr. Pawan Kumar	SG	Mar. 00-Oct. 01	G1
	Mr. Amir Singh	SG	Jan. 02-till date	G1

Apt. 7-C	Mr. Vinod Kumar	SG	Sept. 93-Feb. 96	G1
	Mr. B.A. Fernades	SG	Feb. 96-Mar. 98	G1
	Mr. V. Radhakrishnan	SG	Mar. 98-Mar. 00	G1
	Mr. Madan Lal	SG	Mar. 00-July 02	G1
	Mr. Anil Kumar	SG	July 02-till date	G1
Apt. 7-D	Mr. Ved Prakash Yadav	SG	Jan. 93-Dec. 94	G1
	Mr. Bajrangi Sinha	SG	Dec. 94-Jan. 97	G1
	Mr. Narender Kumar	SG	Jan. 97-Nov. 98	G1
	Mr. M.K. Chattaerjee	SG	Nov. 98-Jan. 02	G1
	Mr. John Thomas	SG	Apr. 02-till date	G1
Apt. 7-E	Mr. Birbal Ram	SG	Jan. 93-July 94	G1
	Mr. Darshan Lal	SG	July 94-Sept. 96	G1
	Mr. Laxmi Narain	SG	Sept. 96-Nov. 98	G1
	Mr. Joginder Singh	SG	Nov. 98-Feb. 01	G1
	Mr. Neeraj Kumar	SG	Feb. 01-May 03	G1
	Mr. G. Pillai	SG	May 03-till date	G1

Exhibit B

For Official use only

HANDBOOK

OF

Rules and Regulations

RELATING TO

The Indian Foreign Service

VOLUME I
(Corrected upto June 30, 2000)

[LOGO]

Issued by THE GOVERNMENT OF INDIA
MINISTRY OF EXTERNAL AFFAIRS

PART - I

INDIAN FOREIGN SERVICE (PAY, LEAVE, COMPENSATORY ALLOWANCES AND OTHER CONDITIONS OF SERVICE) RULES, 1961
(AS AMENDED)

Authority:- Ministry of External Affairs Notification NO. 778/GA/61, dated 15-12-61, as amended from time to time.

* * *

ANNEXURE X

RESIDENTIAL ACCOMMODATION AND FURNITURE

[Authority:- M.E.A. No. F.21(14)/GA/60-Vol.II, dated 31st March, 1962]

[] S.I. XVIII under Annexure X of IFS(PLCA) rules(1990 edition)

I. **Introductory: -** (1) When serving outside India, an officer shall be entitled, subject to such conditions as may be prescribed by the Government, free of charge, to furnished residential accommodation in accordance with the subsequent provisions of this Annexure.

(2) For the purposes of sub-paragraph (1) above, the term 'furnished residential accommodation' shall ordinarily include furniture, carpets, durries, draperies, crockery, cutlery, glass-ware, electric bulbs and a cooking range of the type in common use in the foreign country concerned, subject to the provisions of sub-paragraph (5).

(3) In the case of the residence of a Head of Mission and [HOPs of Grade III] the furnished residence may include, in addition to the items mentioned in sub-paragraph (2), a refrigerator, a radiogram, kitchen utensils for representational entertainment and such other item or items as the Government may, by general or special order, sanction for use for representational purposes. All these items will be subject to the scales provided for in sub-para (5).

(4) In the case of a Head of Post other than at (3) above, the term 'furnished residence' may include, in addition to the items mentioned in sub-paragraph (2) such of the other items mentioned in sub-paragraph (3) as the Government may, by general or special order, sanction for any particular post, and subject to the scales provided for in sub-para (5).

(5) The Government may, by general or special order, prescribe in respect of any officer or category of officers, the scale of accommodation and the scale, type and quality of the furniture and furnishings e.g. carpets, draperies, crockery, cutlery, glass-ware and any other admissible item to be provided at Government expense in the residence(s)

of such officers. For scales already laid down please see Appendices I, II (A) to (H) to this Annexure. The Government may also prescribe the monetary ceiling in respect of rental accommodation, furniture, carpets, crockery etc.

2. Government-owned accommodation – (1) Where Government own property at a station abroad, they may reserve that property or a portion thereof as the residence of the Head of Mission/Post, or for an officer of a particular designation in the Mission, or may declare the property to form part of a pool of residential accommodation available at that Mission.

(2) Where any particular accommodation has been specified by the Government as the residential accommodation reserved for a particular officer (including the Head of Mission/Post) such officer may not, without prior sanction of the Government, stay at Government expense at a hotel or take alternative residential accommodation. If such an officer without prior Government sanction, stays at a hotel or rents other accommodation, the hotel charges or the rental of the alternative accommodation shall be borne entirely by the officer concerned:

Provided that where an officer, for whom Government-owned accommodation is reserved, is under orders of transfer and is to avail of his preparation time of eight days and where his successor has arrived before the completion of the preparation time of eight days, the Head of Mission or Post may, if he considers it necessary, authorise the stay of one or the other officer at a hotel for a period not exceeding eight days plus the period of any overlap sanctioned when no other suitable Government-owned or leased accommodation is available.

(3) (i) Where Government-owned accommodation reserved for a particular officer has, for reasons beyond the control of the officer, become uninhabitable or where the officer is required to vacate it for purposes of major repairs or renovations, the Ministry may permit the officer to stay in a hotel.

(ii) Where Government-owned accommodation is not reserved for a particular officer or an officer of a particular designation and is declared to be in the pool, it shall be allotted by or under the orders of the Head of Mission/Post in accordance with such regulations as the Government may prescribe and where the Government have not prescribed any regulations in accordance with such local regulations as the Head of Mission/Post may prescribe.

(iii) An officer to whom Government-owned accommodation in the pool is allotted by or under the authority of the Head of Mission/Post shall occupy such residence within such period as the Head of Mission/Post may specify. An officer who declines or fails to do so will not be eligible either for alternative accommodation at the expense of the Government or for the reimbursement of hotel charges if he stays in a hotel:

Provided that the officer shall again become eligible for the allotment or supply of residential accommodation at the expense of the Government after a period of three months or the date on which the accommodation offered to him is occupied by any other officer of the same rank, status and entitlement as himself whichever date is later.

(4) The plinth area norms for construction of residential buildings for India-based officers and staff abroad would be as follows: –

(i) Class IV, including Security Guards, non-diplomatic staff	40 sq. meters
(ii) LDC, UDC, Assistant and other non-diplomatic staff	75 sq. meters
(iii) Third Secretary/Attache/PS	110 sq. meters
(iv) First Secretary/Second Secretary	150/130 sq. meters
(v) Counsellor	170 sq. meters
(vi) Ambassador and Minister	To be decided on merits

In addition to the area of the main unit mentioned above, additional area for circulation/stair cases etc. would be permissible. A variation of 2% will be allowed.

As regards renting of accommodation, the Missions may continue to lease residential accommodation on room-wise basis as laid down in Appendix I of this Annexure. However efforts should be made to ensure that the plinth area of rented property does not vary significantly from the 'norms' prescribed for construction above.

(No. Q/Prop/551/9/86 dated 5th August, 1986)

3. Accommodation taken by Government on long lease: Where the Government have acquired a lease of any accommodation for a period exceeding three years, such accommodation shall, during the currency of the lease, rank as Government-owned accommodation and all the provisions of paragraph 2 above shall apply, *mutatis mutandis*, to an officer for whom it is reserved or to whom it is allotted. In obtaining accommodation on long lease, the Head of Mission/Post will ensure that the cautionary measures provided under para 4 are kept in mind.

4. Accommodation taken by Government on short lease: (1) Where at a station, accommodation to which paragraphs 2 and 3 apply, is not available for any particular officer serving at that station, the Head of Mission/Post may, subject to paragraph 1 above and to the provisions of sub-paragraph (2) to (13) below, obtain residential accommodation for such officer by executing a short lease not exceeding three years in duration.

(2) The Government may prescribe, by general or special orders, the ceiling rentals within which accommodation for an officer or a category of officers shall be obtained on short lease by the Head of Mission under the provisions of sub-paragraph (1) and may prescribe separate ceilings where necessary for furnished, unfurnished or partly furnished accommodation and separate scales or ceilings according to marital status or size of family.

(3) Subject to considerations of economy and the prescribed rental ceiling, the accommodation taken on short term lease should normally be within a reasonable distance of the Chancery, particularly in respect of a representational officer.

(4) Where the Head of Mission is satisfied that suitable accommodation for an officer cannot be found in reasonable time within rental ceiling prescribed by the Government under sub-paragraph (2) he shall, with a view to avoiding heavy expenditure on hotel charges, arrange residential accommodation (even a smaller accommodation than the entitlement) for the officer within the rental prescribed for him even if it means taking a building with lesser accommodation than his entitlement.

(5) In obtaining accommodation on short lease, the Head of Mission/Post shall ensure that accommodation to which

the furnished or partly furnished rate of rental ceiling applies has as far as possible the prescribed complement of furniture, draperies, carpets and other items (excluding crockery, cutlery and glassware) admissible to the officer for whom the accommodation is rented. If he finds that the full complement of such articles is not provided by the landlord in the accommodation to be rented even at an enhanced rent (which shall of course be subject to the prescribed ceiling) he shall estimate the approximate cost of the items which will subsequently have to be provided to the officer at the expense of the Government and the rental ceiling for the accommodation for the officer, as sanctioned by the Government, shall stand reduced by a monthly amount equal to 1.5% of the estimated cost of the articles to be supplied at the cost of the Government.

(6) The lease entered into by the Head of Mission under the provisions of this para shall ensure that normal maintenance and repairs of the property shall be duly carried out by the landlord, and that no claim for damage to the property or the contents thereof shall be admissible in respect of fair wear and tear, that the property is at all stages fully habitable and available for purposes of residence including representational entertainment, that it is wind and weather tight and that the government, or the officer nominated by them, shall have quiet and peaceful possession thereof during the course of the tenancy. To the extent possible, the lease shall be executed in the form laid down in Appendix III to this Annexure.

Before a lease is signed, the Missions must satisfy themselves that the landlord will abide by the terms of the lease and if necessary secure guarantee for the fulfillment of the agreement by the landlord. Missions have no authority to carry out repairs and maintenance of the leased

buildings at Government cost if in the terms of the lease it is the responsibility of the lessor. For incurring any expenditure in such cases, prior sanction of the Government has invariably to be sought.

(7) Wherever possible, the Head of Mission, shall before executing the lease, have the accommodation and the contents thereof duly surveyed by a reputable firm of surveyors and obtain a survey report. A similar survey report shall be obtained at the end of the period of tenancy. The survey report shall, inter alia, indicate loss or damage which is solely attributable to fair wear and tear, loss or damage which has occurred owing to negligence or misuse and loss or damage which is not fair wear and tear but which has occurred due to causes beyond the control of the occupant.

(8). (i) The Head of Mission shall ensure that the property leased and the contents thereof are fully insured by the landlord or alternately, that the landlord expressly accepts the risk of destruction or damage owing to causes beyond the control of the tenant or occupant.

(ii) In case the property and its contents are not insured by the landlord and the landlord refuses to get them insured at his cost and insists upon the property and the furniture being insured as a pre-condition for renting the accommodation and furniture, the Mission concerned should try to have the rent raised to include insurance charges rather than take out the insurance in the name of the Mission. The final rent should, however, not exceed the rental ceiling applicable to the officer/member of staff for whom the house is being rented. The ceiling rental will thus include the rent of unfurnished accommodation and

the rent of furniture, besides an element to cover the insurance of furniture and accommodation.

9 (i) As far as possible, the Head of Mission shall ensure that the lease incorporates a break clause (generally known as the 'diplomatic break clause') under the provisions of which the lease can be terminated at a notice of one month or other similar short notice not exceeding two months, in the event of breach of diplomatic relations with that country or the transfer of the particular officer for whom the accommodation is being leased and for the refund of rent, if paid in advance, for the unexpired period of lease.

(ii) Where the owner or landlord does not agree to the diplomatic break clause, either in full or in part, and the Head of Mission/Post is satisfied that no alternative accommodation is likely to be available on better terms within the foreseable future, he may execute the lease without the diplomatic break clause provided that the officer for whom the house is being leased is normally expected to remain at the station for the period for which the lease is executed. Where, however, there is a possibility of such an officer being withdrawn by the Government before the expiry of such period, either because the officer will complete his term before the date of expiry of the lease or because the post he is holding is a special or additional post sanctioned for a specified period, the lease shall not be executed and, where necessary, the matter referred to the Government for orders.

(10) For the purpose of obtaining accommodation on lease under the provisions of this rule, the Head of Mission/Post may incur, and pay, obligatory charges incidental to the lease including customary agents' commission, if

any, surveyors' fees and, in cases of disputes arising out of the lease, also such legal charges as may be necessary and as fall within his financial powers vide item No. 13 of the Schedule 1 of the booklet entitled "Financial Powers of the Govt. Of India's Representatives Abroad".

(11) Normally the lease shall provide that the only financial responsibility of the Government shall be the payment of the rent as laid down in the lease. If, however, the Head of Mission finds it necessary to execute a lease according to which certain obligatory charges are to be met by the Government, he may execute the lease accordingly, provided that in that event the rental ceiling fixed by the Government for the officer concerned shall stand reduced by the amount of the additional monthly expenditure falling on the Government under the terms of the lease.

(12) (i) Only where an officer is under general or special orders issued by the Government, entitled to a telephone at his residence, any charges levied by the Telephone Department or Company or by the landlord in respect of the installation or retention of a telephone at the residence of the officer, shall be borne by Government separately from the rental paid for the residence and if the charges in respect of the telephone form part of the rental to be paid for the residence the ceiling sanctioned by Government in respect of such officers when additional charge on account of telephone and the actual rent of the house exceed the prescribed ceiling, shall be increased by the average monthly payment on account of the telephone.

(ii) Where an officer is not entitled to a telephone at his residence but a telephone already exists at the residence leased for such officer and the landlord is not prepared to have it disconnected or the cost of such disconnection

would be disproportionate to the savings effected thereby, the Head of Mission may permit the telephone to be retained at the residence provided that the rental of the accommodation, including the rental but not the call charges of the telephone, does not exceed the rental ceiling fixed by the Government.

13 (i) Where the accommodation proposed to be leased for an officer contains articles to which an officer is not entitled on the basis of the scale of furniture etc. prescribed by the Government e.g. refrigerator, radiogram, washing machine, objets d'art, linen, etc. the Head of Mission/Post shall, wherever possible, arrange for the landlord to remove and store such articles separately.

*ii) The officer should also see that the accommodation leased for him contains only the furniture and furnishings to which he is entitled and they have been specifically mentioned in the lease deed. All other items of furniture etc. should be brought to the notice of the Head of Mission in writing by the occupant. Government will not be responsible for any charges on this account.

(iii) Where the landlord does not agree to remove and store such articles separately, the Head of Mission shall ascertain in writing from the officer for whom the accommodation is to be leased whether the latter is prepared to assume full responsibility for the upkeep and maintenance of such articles and for making payment for any damage or loss in respect of such articles. If the officer accepts such liability in writing and if the rental for the accommodation, including the use of such articles, does not exceed the

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* Para 3 of S.I. IV under Annexure X of IFS (PLCA) Rules (1990 edition) added.

rental ceiling fixed by the Government, the Head of Mission/Post may execute the lease. But any charge on account of electricity, municipal taxes etc. shall be borne by the officer. If the officer does not accept the liability or if the rental for the accommodation, including the use of such articles, exceeds the rental ceiling fixed by the Government, the lease shall not be executed. In such cases, the Head of Mission/Post shall not exercise the financial powers delegated to him by the provisions of sub-paragraph (4) above.

iv) Where an officer has assumed in writing the liability referred to in clause (iii) above and subsequently fails to maintain or safeguard the articles referred to in clause (i) or fails to make payment for any loss or damage appertaining thereto, the Head of Mission/Post may assess or cause to be assessed the extent of the loss or damage as well as the compensation payable to the landlord thereon. He shall thereafter call upon the officer concerned in writing to make payment of the sum assessed to the landlord or to his specified agent by the date specified by the Head of Mission. Where the officer fails to make payment by the date specified by the Head of Mission and within one month thereafter, the Head of Mission may make payment from Government funds for the loss or damage assessed under intimation to the accounts authority concerned with the request to such authority to recover the sum in one or more installments, not exceeding six, from the salary of the officer concerned. The accounting authority concerned shall thereupon deduct the said amount or amounts from the salary of the officer concerned.

14) If an officer for whom accommodation is reserved under the provisions of this para is under orders of transfer and is to avail of his preparation time of eight days and where his successor has arrived before completion of such preparation time of eight days, the Head of Mission/Post may, if he considers it necessary, authorise the stay of one or the other officer at a hotel for a period not exceeding eight days plus the period of any overlap sanctioned when no other suitable Government owned or leased accommodation is available.

*15) All the terms and conditions of the lease should invariably be stated in the lease deed. There should be no private understanding between the landlord and the occupant on any account. If the landlord wishes to have some private arrangement with the occupant regarding the payment of charges on account of water/electricity/ gardening etc. these should be on record either in the lease deed itself or in the form of letters exchanged with the Mission. The Mission should, see that all such terms and conditions are accepted by the occupant. No cognizance will be taken of any private arrangements between the landlord and the occupant. If any claims are received from the landlord on this account after the departure of the officer from the station those will have to be met by the officer himself.

*(16) No accommodation which is in excess of the entitled scale of the officer should be rented without prior approval

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* Para 1 of S.I. IV under Annexure X of IFS (PLCA) Rules (1990 edition) added.

* S.I. III under Annexure X of IFS (PLCA) Rules (1990 edition) added.

of the government except where the monthly rent of such accommodation is within the ceiling rental fixed by the Government and the Head of Mission is, therefore, empowered to rent it. Full particulars of the accommodation rented in the prescribed form should invariably be intimated to the Ministry in each case even when renting is done under the Mission's own powers.

Verbal assurances to landlords/agents which might embarrass the Government/Mission later on should be avoided.

**(17) Heads of Missions have been authorised to increase the prescribed rental ceiling for a normal family unit by 10% where there are more than two children living with an officer abroad and not less than two of the children are above the age of six years. It, has further been enjoined therein that this relaxation of 10% increase should be avoided as far as possible and allowed only in genuine case of hardship. This concession shall be granted only on a specific application being made by the official concerned for the increase. In making this application the official shall state whether the children in respect of whom additional accommodation is required will continue to stay with him during the entire period for which the concession is proposed to be availed of. Any changes in the number of children actually staying with the officer should immediately be brought to the notice of the Head of Mission, who should decide whether the concession should be continued or not.

** S.I. II under Annexure X of IFS (PLCA) Rules (1990 edition) added

*(18)(i) Missions for which rental ceilings have been prescribed should not exceed the rental ceilings without prior approval of the Government. Proposals for hiring residential accommodation at rents in excess of the prescribed ceiling should be referred to the Ministry complete in every respect and there should be a margin of at least 10 days for the Ministry to take a decision.

(ii) Missions for which rental ceilings have not been prescribed should invariably forward all proposals with complete details in the prescribed proforma showing rental of the proposed accommodation and the reason why it is in excess of the existing operative ceiling.

5. **Obligations of an officer provided with furnished accommodation which is Government-owned or taken on long lease** – (1) An officer who is provided with accommodation owned by the Government or taken by the Government on long lease shall before taking possession of such accommodation, carry out a complete check of the premises and the movable contents thereof. He shall also compare the movable property in the premises with the list of such property as carried in the compendium of Government property in the Mission/Post. He shall bring in writing to the notice of the Head of Mission/Post any discrepancies, shortages, defects or any other points relevant to the safeguarding of the Government's financial interests, or if the officer is himself the Head of Mission/Post, to the notice of the Ministry.

(2) Such an officer shall also, during the course of the allotment to him of such accommodation, promptly bring

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* S.I. IX under Annexure X of IFS (PLCA) Rules (1990 edition) added.

to the notice of the Head of Mission/Post, or of the Government, as the case may be, any damage to the building or its appurtenances or to the moveable contents thereof or any loss or any event or occurrence which has a bearing on the interest of the Government in such property.

(3) Such an officer shall also make an inventory of the movable property belonging to the Government in his possession at the time of his vacating such accommodation and shall compare it with the compendium of Government property maintained by the Mission or Post. He shall report in writing any loss or damage to Government property which has occurred during the period of his occupation of the premises.

(4) The Head of Mission/Post [which term includes for the purposes of this sub-paragraph and sub-paragraph (5), the Government in respect of the Head of Mission/Post] shall decide whether any portion of the aforesaid loss or damage is ascribable to negligence or misuse and, if so, shall assess or cause to be assessed the value thereof. He may call upon the officer to make payment for such loss or damage.

(5) If there has been no loss or damage, or if no portion of such loss or damage is ascribable to negligence or misuse or if the officer has paid the amount which the Head of Mission has called upon him to pay under the provision of sub-paragraph (3) the Head of Mission/Post shall give, or cause to be given to the officer, a clearance certificate stating that nothing is due from the officer in respect of his occupancy of Government owned or long leased accommodation at the station.

(6) Where an officer has been called upon to pay for such loss or damage, as has been assessed by the Head of

Mission/Post or under his authority, to have been caused by negligence or misuse on the part of the officer or his family or his servants, the officer shall, if he considers that the loss or damage has been wrongly ascribed to negligence or misuse, pay the amount to the Mission or Post under protest and may thereafter lodge a representation to the Government through the Head of Mission/Post. The decision taken by the Government shall be final.

(7) Where the Head of Mission is satisfied that any loss or damage caused to Government property, furniture, furnishings, fixtures, etc., during the period of occupancy of a particular officer cannot be ascribed to negligence or misuse, he may write off the loss or damage, under the powers delegated to Heads of Missions under item 1 of Schedule II of the "Financial Powers of the Government of India's Representatives Abroad". If the loss or damage exceeds the amount upto which powers have been delegated to him, he shall report the matter to the Government for their decision. The Government may thereupon take such decision as they consider fit and proper, provided that if the Government consider that any part of loss or damage is ascribable to negligence or misuse and should be paid for by the officer, the Government shall give an opportunity to the officer to show cause against the proposed decision.

(8) The provisions of para 6, sub-paras 1-8 below shall apply *mutatis mutandis to accommodation taken on long lease.*

6. Obligations of an officer provided with residential accommodation taken on short lease – (1) Where an officer has been given accommodation obtained by the Head of Mission on a short term lease in accordance with

paragraph 4, such officer shall unless a survey of the property and its contents has been carried out under the provisions of sub-paragraphs (7) of paragraph 4, himself carry out a general survey in collaboration with an officer nominated by the Head of Mission and the landlord or his representative. A detailed survey report shall be prepared of which a copy shall be retained by the officer and another by the Mission or Post.

(2) The officer shall maintain the property and its contents in fit and proper condition. He shall not carry out any additions or alterations in the property which may affect its structure and lead to claims for compensation without the specific approval of the Head of the Mission/Post.

(3) The officer shall promptly report in writing to the Head of Mission/Post, or to any officer nominated by him, any loss or damage or any other fact relevant to the lease entered into by the Head of Mission/Post.

(4) At the time of vacating the premises, unless a survey has been carried out under the provisions of sub-paragraph (7) of paragraph 4, the officer shall again carry out a complete survey of the property and its contents with the collaboration of an officer nominated by the Head of Mission/Post and the landlord or a representative or an agent. A copy each of the detailed survey report shall be retained by the officer and by the Mission/Post.

(5) Whether or not any damage or loss has occurred to the premises or their contents during the period of occupancy of the officer, the latter shall at the time of vacating the premises, obtain from the landlord a clearance certificate stating that the latter has received back the premises in good order and that no claim for loss or damage against

the occupant or the Government is outstanding. Where the premises are handed back not to the landlord but to the Mission/Post for the use of another officer, the officer shall obtain a clearance certificate from the Mission/Post.

(6) If the landlord is not willing to give a clearance certificate, the officer shall forthwith report the fact to the Head of Mission/Post. The Head of Mission shall thereupon assess or cause to be assessed which portion of the loss or damage is due to negligence or misuse or lack of proper maintenance on the part of the officer and shall assess or cause to be assessed the value thereof. He shall thereupon call upon the officer to pay the amount determined by him to the Mission/Post. If the officer pays the said amount by the date prescribed by the Head of Mission, the latter shall try to arrange for the landlord to give the clearance certificate against payment of such sum. If the landlord still declines to do so and if the Head of Mission considers that the claim or claims made by the landlord or his agent are either not sustainable or relate to items which, in his view, should be paid for by the Government, he shall grant the officer a provisional clearance certificate himself and report the fact to the Government for orders.

(7) Where an officer fails to take action as prescribed in sub-paragraphs (1), (4) or (6) or, prior to his leaving the station, to obtain the clearance certificate from the landlord or from the Mission/Post in accordance with sub-paragraph (5) or (6), and where subsequently claims against him are raised by the landlord or his agent, the Head of Mission/Post shall, after such reference to or consultation with the officer as may in his view be possible, assess or cause to be assessed the amount payable to the landlord in respect of the said claims. If the claims are

less than Rs.500 (Rupees Five hundred) in value, he may make the payment from Government funds and order recovery of the amount from the officer. Where the amount of the claim exceeds Rs.500 (Rupees Five Hundred), the Head of Mission shall report the facts to the Government. The Government may thereupon authorise payment by the Head of Mission/Post of the amount of the claim or such portion thereof as they consider reasonable and simultaneously order recovery of the total amount so paid from the salary of the officer. Unless the officer is able to show good and valid cause for his failure to take the prescribed action or to obtain the clearance certificate before his leaving the station, the Government will not agree to bear any portion of the expenditure incurred in meeting the claim.

(8) Where an officer is called upon by the Head of Mission to make payment in accordance with sub-paragraph (6) above and fails to do so, the Head of Mission shall report the facts to the Government with a view to the drawing up of departmental proceedings against the officer. It shall be open, however, to an officer to pay the amount under protest and lodge a representation to the Government through the Head of Mission/Post, in which case the Government shall pass such orders as may seem to them fair and just.

7. Discretion of Head of Mission in allotment of residential accommodation – (1) Where a Head of Mission/Post has obtained for a diplomatic officer residential accommodation on long lease or on a lease not containing the diplomatic break clause and such accommodation is, for any reason, lying vacant or likely to become vacant, the Head of Mission/Post may allot that accommodation to any other diplomatic officer or, at his discretion, to a

non-diplomatic officer of the Mission who has subsequently joined, or who, on the date of vacation of the accommodation, is staying at hotel. The order of allotment shall prescribe the date by which the officer should move to the premises allotted to him.

*(2) Head of Mission's residence can also be utilised partially or wholly as the case may be, by any other officer to avoid hotel expenditure with the approval of the Government. In case of any doubt Government's instructions should be sought immediately.

(3) On allotment of such accommodation, the officer to whom it is allotted shall occupy it for such period as the Head of Mission/Post may decide, having regard to considerations of economy and the status of the officer concerned.

(4) If any officer to whom the Head of Mission/Post has allotted the accommodation fails to occupy it, he shall cease to be eligible for accommodation at the expense of the Government or the reimbursement of hotel charges with effect from the date of expiry of the period specified by the Head of Mission/Post under sub-paragraph (1). He shall again become eligible for the allotment or supply of residential accommodation at the expense of the Government only when the accommodation which he has declined to occupy is occupied by another officer or the lease expires, whichever is earlier.

(5) Subject to the provisions of paragraph 4(4) the powers conferred on the Head of Mission/Post by this rule shall

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* Para 2 of S.I. III under Annexure X of IFS (PLCA) Rules (1990 edition) added.

not, except at the written request of the officer, be so exercised as to allot to any officer –

(i) accommodation which falls short of his entitlement by more than one room or is suitable for an officer who is more than one rank junior to him; and

(ii) allot to a diplomatic officer accommodation acquired for the use of a non-diplomatic officer, except that accommodation acquired or leased for a married non-diplomatic Group 'A' officer may, if the Head of the Mission/Post considers it suitable, be allotted to a single First Secretary, single/married Second Secretary or a single/married Third Secretary.

(6) Where a Head of Mission/Post has under his charge Government-owned or leased accommodation which is unoccupied and which he has been unable to utilise for a period of three months, even by the exercise of the powers conferred by sub-paragraph (1), he shall forthwith report the facts to the Ministry for orders. In the case of a leased building, the report shall be made as soon as it is felt that the accommodation is likely to remain vacant during the next three months.

(7)(i) An officer shall not be entitled to the cost of transporting effects, whether personal or belonging to the Government, from one residence in the same station to another such residence or from a hotel, whether on first or subsequent stay, to a residence or vice versa where the shifting is done voluntarily by him to obtain more satisfactory accommodation.

(ii) When the shifting is involuntary, i.e. not at the request of the individual officer but at the instance of

Head of Mission for any reason what so ever the expenditure incidental to the shifting of Government properties as also the personal effects to be shifted shall be met out of Government funds.

(iii) All cases of involuntary moves where shifting is done at public expense should, however, meet the following requirements: –

(a) The Mission should, wherever practicable make necessary arrangements for the transportation of effects both personal and Government, rather than reimburse the expenditure to the official concerned;

(b) shifting should not be encouraged unless it is inevitable; and

(c) all cases should have the prior approval of the Head of the Mission/Post and while approving the move he should certify that the shifting is in the public interest.

8. Stay at a hotel – (1) No officer should be put up in a hotel without the prior approval of the Ministry. The Head of Mission/Post may, however, authorise accommodation in hotel as provided for in proviso to Para 2 (2).

(2) During stay in the hotel the officer shall be entitled to draw cash allowance or double the Foreign Allowance whichever is less for the first 21 days and thereafter only normal Foreign Allowance shall be admissible. In case of newly opened Missions or Missions opened after remaining closed for some time, the officer shall be entitled to Cash Allowance or double the Foreign Allowance upto sixty days, if the hotel stay has been permitted by the Ministry.

(3) The accommodation should be arranged in one of the hotels on the approved panel of the Mission/Post.

(4) When a Head of Mission or any other diplomatic officer is lodged in a hotel on his arrival at a post abroad pending the provision of a regular accommodation, his private Indian servants whose cost of passage is borne by the Government will be entitled to accommodation in a hotel at Government cost subject to the following conditions : –

(i) The accommodation will not be more than what is admissible to a Group 'D' Government servant;

(ii) The accommodation is provided at the lowest possible rates;

(iii) The duration of stay in the hotel will not exceed the period for which the officer himself is permitted to stay in a hotel.

(5) **(A) Officers who are obliged to stay in a hotel due to non-availability of residential accommodation, shall be entitled to the scales of accommodation as laid down below : –**

(I) Heads of Missions :

(i) When not accompanied by family – A single bed room or, if a suitable room is not available, a double bed room plus a sitting room.

(ii) When accompanied by wife – Only a self contained suite consisting of a double bed room plus a sitting room,

(iii) When accompanied by wife & children – As in (ii) above plus –

(a) If a child upto three years of age – An extra cot in the same room. The charges for putting the cot to be met by Government separately.

(b) If a child over three years of age – A single bed room.

(c) If two children each over three years of age – A double bed room.

(d) If three children each over three years of age – (b) plus (c) above.

(e) If four children each over three years of age – Two double bed rooms.

(II) **Officers other than Heads of Missions :**

(1) Men not accompanied by family : Single bed room.

(2) When accompanied by family :

(a) When accompanied by wife only – A double bed room.

(b) When accompanied by wife and children – As in (a) above plus

(i) If a child upto three years of age – An extra cot in the same room. The charges for putting the cot to be met by Government separately.

(ii) If a child over three years of age – A single bed room.

(iii) If two children each over three years of age – A double bed room.

(iv) If three children each over three years of age – (ii) plus (iii) above.

(v) if four children each over three years of age – Two double bed rooms.

***9. Guidelines on arrangement of residential/hotel accommodation for the officer : –** (1) The stay of officer in hotel on first arrival should be avoided as far as possibl . HOMs are empowered to accommodate the officers in hotels only on first arrival during the joining time availed by them/their predecessors in the Mission, if no other suitable accommodation is available. In all other cases prior sanction of the Ministry should invariably be obtained before incurring additional expenditure. To minimise the stay of officers in hotels on first arrival, the Missions should follow the undermentioned procedure :

(i) On receipt of the advance intimation about the size of the family of the officer on transfer, the Mission should examine whether the accommodation already rented for the relieved officer, may be retained for the officer if the terms of the lease so permit and the accommodation is in conformity with the prescribed scale. If the lease cannot be extended or the scale of entitlement is significantly different from that of the relieved officer, the Mission should look for alternative accommodation within the ceiling rental or at the existing rent whichever is less, synchronising the lease with the arrival of the incoming official to the maximum extent possible.

(ii) In case the Mission finds it difficult to arrange accommodation in time, the Personnel Section in the Ministry should be immediately informed to defer the departure of the incoming officer.

(iii) In case of difficulty in finding entitled accommodation within the prescribed rental ceiling, a formal proposal

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* S.I. XVI under Annexure X of IFS (PLCA) Rules (1990 edition) added.

should be immediately submitted to the Property 1 Section of the Ministry for sanctioning the rent proposed or for raising the rental ceiling.

(iv) In case where the relieving officer is likely to arrive after the departure of the relieved officer, the desirability of retaining the accommodation of the relieved officer for the intervening period may be examined in detail and the proposal referred to the Ministry. In particular, it may be checked that the accommodation proposed to be retained is fit from all points of view for his successor.

(2) It is the primary responsibility of the Chancery to find accommodation for the officers and staff. The Chancery should maintain a record of all action taken in each individual case to obtain residential accommodation. It is not for the officers to pick and choose their accommodation, even if the accommodation is slightly below their entitlement, and if it is otherwise found suitable by the Chancery, the officer concerned should move into it in the overall interests of Government.

[No.Q/Accts.I/7342/1/77, dt.27/4/1978]

10. Heating – (1) On the recommendations of the Foreign Service Inspectors or of the Head of Mission/Post, the Government may declare that on account of extreme climatic conditions it is necessary to provide for the heating of offices and residences of officers at a particular station. The stations to which this concession has already been extended are listed in Appendix V to this Annexure.

(2) Where the Government have made a declaration in respect of any station in terms of sub-paragraph (1), the Head of Mission/Post; may prescribe, from year to year, the date on which heating at the expense of the government

may commence in that year as also the date on which heating will be discontinued at the end of the cold weather in that station. This may be done both in respect of the Chancery and the residences except where the heating is provided by the landlord as part of the tenancy. In such cases regardless of whether or not the heating charges are included in the rent or are claimed by the landlord as a compulsory charge, an order should be issued by the Head of Mission/Post indicating the non-heating period for which the expenditure on account of running hot water, if provided, is to be met by the officer concerned himself provided that if such running hot water during non-heating period is supplied as a part of the central heating system, the expenditure will continue to be borne by the Government. As regards his own residence, the Head of Mission/Post should report the relevant dates to the Ministry for formal approval.

(3) Where the heating is provided by means of a central heating system, the expenditure on such heating including the cost of oil, or other fuel, maintenance of the heating system, annual cleaning, removal of soot or ashes, shall be met by the Government.

(4) The Head of Mission/Post, in consideration of the local climatic conditions and other relevant factors, shall fix the scale of oil, firewood, charcoal or coal, as well as reasonable monetary ceiling for incidental charges such as ash removing charges, stokers charges for all officers (including the Head of Mission/Post) and members of the staff subject to the following conditions : –

(a) The payment should be made on production of vouchers or receipts from reputed firms along with a certificate from the person concerned that the quantity of coal etc.,

has actually been consumed for the purpose of heating only and that the expenditure on incidental charges has actually been incurred for the purpose for which the ceiling is fixed; and

(b) The Mission should report the scales prescribed by the Head of Mission/Post for different grades of officers to the Ministry. Any variation to the prescribed scale should also be reported to the Ministry as and when occasion arises.

(c) [illegible] provisions shall not apply to the Missions where the Government have already prescribed heating allowance for heating charges.

(5) Where the heating is by gas or electricity, the expenditure on such heating shall be met by the Government. If there are no separate meters to indicate the amount of gas or electricity consumed specifically for space heating, the Head of Mission/Post shall determine what part of the total bill may be deemed to represent the additional expenditure on heating. The amount so determined shall be payable by the Government.

*(6) No heating appliance should be purchased out of Government funds for use in a building which is already centrally-heated. If, for any reasons, the need for purchase of such an appliance arises, Government's prior approval should invariably be obtained.

11. Upkeep of gardens at residences of Heads of Missions/Posts – (1) The Government will as indicated in

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* S.I. VI under Annexure X of IFS (PLCA) Rules (1990 edition) added.

sub-paras (2) to (4) meet the expenditure on the normal upkeep of any garden which may be attached to the residence of a Head of Mission/Post, unless the residence is in a leased building and under the terms of the lease the maintenance of the garden is the responsibility solely of the landlord.

(2) For the purposes of such upkeep the Government may sanction one or more full-time or part-time gardeners. Expenditure on the wages of such gardeners shall be met by the Government.

(3) Heads of Missions and Posts, vide sub-item (viii) of Annexure II mentioned under item 16 of Schedule I of the "Financial Powers of the Government of India's Representatives Abroad" have been authorised to purchase from Government funds the necessary garden implements and tools, including power-driven lawn mowers, for their residences, Chanceries and also for the residences of the other entitled officers. The cost of maintenance of such tools and accessories shall be met by the Government.

(4) For Government owned properties the Government may, by general or special orders, prescribe the annual amount up to which expenditure may be incurred by a Head of Mission or Post on manure, seeds, plants, flower-bulbs and water charges.

*(5) HOMs/HOPs would be entitled to a garden grant for purchase of seeds, plants, manure, flower pots etc. for the gardens attached to their residences, which have been taken on rent, as per following limits: –

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* S.I. XXI under Annexure X of IFS (PLCA) Rules (1990 edition) added.

I. Garden grant equal to 0.75% of the annual rent if the size of the garden is less than ¼th of an acre;

II. Garden grant equal to 1.25% of the annual rent if the size of the garden exceeds ¼th of an acre.

The disbursement of the grant would be either as direct payment by the Mission or as reimbursement of the expenditure incurred by the officer subject to the production of proper receipts for actual expenditure etc.

****12. Upkeep of gardens at residences of representational officers other than Head of Mission :** – The HOM/HOP (Cat I & II) may sanction the expenditure on maintenance of gardens attached to the residences of representational officers other than themselves for both Government owned & rented accommodation to the following extent: –

(a) Employment of part-time gardener : For each residence, upto one man hour per day, where the area of garden does not exceed one-fourth of an acre; upto two man-hours per day where the area of the garden exceeds one-fourth of an acre. Where help on an hourly basis is not available, the permissible number of man-hours in respect of all or any group of residences may be pooled together and within the total man-hours thus permissible a whole time gardener(s) can be employed on condition that the total man-hours of such gardener(s) do not exceed the total hours admissible under para 1 above.

** S.I. XXII under Annexure X of IFS (PLCA) Rules (1990 edition) added.

(b) Purchase of seeds, plants, fertilizers etc. :Rs.1000/- per annum where the area of the garden does not exceed one-fourth of an acre; Rs.2000/- per annum where the area of the garden exceeds one-fourth of an acre.

(2) In respect of a rented residence the above powers are to be exercised subject to the condition that under the lease agreement, the responsibility of maintenance of the garden attached to such a residence is not that of the lessor.

(3) Where the residence of the officer is a flat in a property leased by the Government, no expenditure shall normally be incurred out of Government funds for the maintenance of the common compound in which the building is situated. Where, however, in such a case, the terms of the lease make it compulsory for each tenant to make a contribution towards the maintenance of such common compound, the cost of such compulsory contribution may be met out of Government funds, provided always that the rental for the flat has been fixed at a figure the difference between which and the permissible rental ceiling for the residence of the officer concerned is sufficient to cover the cost of such compulsory contribution.

13. Prohibition of subletting – (1) An officer shall not, without the prior consent in writing of the Ministry, sublet the whole or any portion of the accommodation supplied to him by the Government.

(2) An officer shall not use any part of the accommodation given to him by the Government for the purposes of putting up paying guests or allow any person to use any part of the premises or any facilities attached thereto in return for a monetary or pecuniary gain.

(3) An officer may put up house guests, relations or personal friends, at the accommodation supplied to him by the Government provided that

(i) such house guests, friends or relations are on a casual visit to the station; and

(ii) such a guest, friend or relation, is not gainfully employed in the country of posting of the officer. This condition may be waived at the discretion of the Head of Mission if the circumstances so warrant.

(4) An officer shall not lend to or allow to be used by, any person who is not resident with him and to whom these regulations are not applicable, any part of the furniture, fittings, etc. or other property belonging to the Government and supplied to him for use at his residence.

14. Maintenance of residences – (1) It shall be the duty of the Head of Mission/Post to ensure that residential accommodation given to an officer, whether owned by the Government or leased on long or short lease, is in a state of good repair and in all respects habitable and that electrical, sanitary, water and other installations are in good working order.

(2) Where the accommodation is obtained on short lease and the landlord is responsible for the proper maintenance of the building and/or electrical, sanitary, water and other installations, the Head of Mission/Post shall make all necessary arrangements to ensure that on receipt of a report from the occupant to the effect that any part of the building is under repair or that any of the installations is not in working order, adequate and timely action is taken by the landlord to carry out the necessary repairs.

(3) [illegible] to which sub-paragraph (2) applies, the landlord cannot be contacted or fails, within reasonable time, to carry out adequate repairs, the Head of Mission may authorize, after duly informing the landlord, urgent repairs to the building or to any installation at a cost not exceeding, during the financial year, Rs.500 or ten per cent of the annual rental of the premises, whichever is less, and initially pay such charges out of Government funds and thereafter deduct such charges from the rent payable to the landlord. If in any case the cost so incurred is not recovered from the landlord the Head of Mission/Post shall report the circumstances of the case to the Ministry for such orders as the Ministry may think fit.

(4) Where the residence supplied to an officer is owned by the Government, the cost of annual maintenance as well as the cost of repairs, from time to time, to the building or any installations therein shall be met by the Government. The Head of Mission/Post may incur, during any financial year, expenditure on such maintenance upto the limit laid down, under item 4 of Schedule 1 of Financial Powers of GOI's Representatives Abroad.

(5) Where residential accommodation supplied to an officer has been taken on lease for a period of not less than one year and according to the terms of the lease the responsibility for maintenance and repairs does not lie with the landlord, the actual expenditure on maintenance and repairs of the building shall be borne by the Government. In such a case, the Head of Mission/Post may incur, during a full financial year, expenditure on such maintenance and repairs of buildings and installations therein upto the limit of 25% of the annual rent. Where the remaining period of the lease falling in any financial year ends before the end of the financial year, the amount

which may be incurred during that financial year shall be upto a limit of 10% of the annual rent.

(6) [illegible] residence provided to an officer has been taken on short lease for a period of less than one year and under the terms of the lease the responsibility for maintenance and repairs does not lie with the landlord the Head of Mission/Post may incur expenditure on repairs and maintenance of the building and installations therein subject to the following limitations : –

(i) where the repairs are of immediate nature and the premises cannot be used without such repairs; and

(ii) the expenditure on such repairs during a financial year does not exceed 10% of the actual rent payable in respect of the period of the lease falling within that financial year.

(7) Maintenance of a building shall be deemed to include minor plumbing work, such as clearing of blocked wash basins and waste pipes, stoppage of leakages etc.

(8) If the estimated cost of repairs on any occasion exceeds Rs.12,000/-, three quotations should normally be called for and the lowest quotation accepted. If the estimated cost exceeds Rs.24,000/- tenders should be invited. Whenever the lowest quotation is not accepted, reasons should be recorded. The condition of calling for tenders/quotations might be waived by the Head of Mission in special cases for reasons to be recorded. In the case of leased buildings, the powers mentioned above are exercisable on the condition that the Head of Mission is satisfied that such expenditure according to the lease deed is the responsibility of the lessee and that the lessee has the

right to remove the installations added by him, when the building is vacated.

*To avoid disputes with the landlords and consequent embarrassment to the Government, Missions should pay special attention to the upkeep of the office buildings by [illegible] laid down in the lease deed. In the case of longer leases, it is advisable to show the building to the landlord for inspection once in a year, or so, so that claims for last minute compensation and other complications do not arise at the time of surrender. There should be no difficulty to maintain the leased buildings in proper repairs at all times when expenditure can be incurred in this regard under item 4 of Schedule I of the 'Financial Powers of the Government of India's Representatives Abroad'. For the exercise of these powers, the Missions should ensure that necessary provision for funds is made annually at the next year budget stage. Care should also be taken to see that the landlord attends to the repairs etc. whenever these are his responsibility according to the lease deed, so that Government's liability is not increased in any way.

15. Retention of accommodation during leave . Retention of residential accommodation by officers proceeding on leave when they are expected to return to their post abroad after the expiry of such leave will be regulated under the provisions of para 2(2)(iv) and para 3(2)(iv) of Annexure XXIV.

16. Maintenance of the residence of Head of Mission/Post in his absence – The maintenance of the residence of Heads of Missions/Posts during the period

* S.I. VII under X of IFS (PLCA) Rules (1990 edition) added.

intervening between the departure of the incumbent and the arrival of his successor will be governed by the following provisions:

(i) In such of the Missions/Posts where the Government have not sanctioned a caretaker, security guard or watchman specifically for looking after the residence of the Head of Mission/Post, one of the local domestic servants of the outgoing Head of Mission/Post may be retained during the period intervening between the departure of the outgoing Head of Mission/Post and the arrival of his successor, to look after the building as well [illegible] and other valuable equipment provided by the Government so that the incoming Head of Mission/Post will find the house in running condition on arrival. The wages of this servant not exceeding the standard wage prescribed for such a servant in the orders sanctioning the *frais* of the Head of Mission during this intervening period shall be a direct charge on Government funds and debited to contigencies.

ii) In addition, the expenditure on electricity, water, gas heating/cooling plants etc., during this period upto the minimum extent found necessary by the outgoing Head of Mission for the upkeep of the building in good order, will also be met from Government funds and debited to contigencies.

iii) From the date the officer designated as Charged' Affaires ad interim moves to the residence of the Head of Mission, the expenditure referred to in clause (ii) above shall be met by him/her for the period he/she occupies the residence. The wages of the servant referred to in clause (i), if still retained, will cease to be a charge on Government funds, and will have to be met by the officer concerned.

(iv) If any other officer (other than the Charge d' Affaires ad interim) or member of the staff, is allowed to occupy part of the premises during such periods, part of expenditure incurred under item (ii) will be recovered from the official concerned. The amount to be recovered will be decided by the Government in each individual case.

17. Categorisation of furniture and equipment for residences – (1) The Government may, by general or special order, prescribe the articles of furniture and other equipment which will be supplied to each Mission/Post underarrangements made by the Ministry.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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THE CITY OF NEW YORK,

Plaintiff,

-against- No. 03 CV 3256 RCC

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, et al.,

Defendants.
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INDIA'S SECOND SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS FOR THE PURPOSE OF JURISDICTIONAL DISCOVERY

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant The Permanent Mission of India To The United Nations ("India"), by its attorneys Kaye Scholer LLP, hereby further responds to Plaintiff The City of New York's First Set of Interrogatories (the "Interrogatories") and First Request for the Production of Documents for the Purpose of Jurisdictional Discovery (the "Document Requests") as follows:

PRELIMINARY STATEMENT

In light of Judge Maas' November 22, 2004 Memorandum Decision, India submits this second supplemental response in an effort to resolve all remaining discovery issues concerning jurisdiction so that the reference to Judge Maas may be closed and the parties may proceed

with briefing on India's motion to dismiss on sovereign immunity and jurisdictional grounds. In this regard, India notes that the City has had since January 16, 2004 a complete list of the names, titles, visa and diplomatic status, and dates of occupancy of each tenant of record in the Permanent Mission of India to the United Nations (the "Indian Mission"), and that since that date the City has also had a sworn affidavit and other materials setting forth the policies and procedures by which India provides such housing, without charge, to those tenants of record. While India believes that no further information is required to decide the jurisdictional and sovereign immunity issues – and while the City has not described how any additional information would be necessary to decide the jurisdictional and sovereign immunity issues – India submits this supplemental discovery response in accordance with Judge Maas' November 22, 2004 Memorandum Decision, and in the interest of avoiding further delay to the resolution of its motion to dismiss.

GENERAL OBJECTIONS

1. Defendant objects to the Interrogatories and the Document Requests to the extent that they seek confidential, diplomatic, or other sensitive information. To the extent Defendant agrees to produce any information, it agrees to do so only pursuant to the protective order dated December 30, 2003, agreed to by the parties and "so ordered" by the Court.

2. Defendant objects to the Interrogatories and the Document Requests to the extent that they violate Article 24 of the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227 ("Vienna Convention"),

which provides that "[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be." *See also 767 Third Avenue Associates v. Permanent Mission of The Republic of Zaire to the United Nations,* 988 F.2d 295, 300 (2nd Cir. 1993) ("History establishes beyond question [] that the Vienna Convention on Diplomatic Relations was intended to and did provide for the inviolability of mission premises, archives, documents, and official correspondence") (citation omitted).

3. Defendant objects to the Interrogatories and the Document Requests to the extent that they go beyond the scope of the jurisdictional discovery permitted by this Court's Order dated October 7, 2003. *See* City of New York v. Permanent Mission of India to the United Nations, et al., No. 03 Civ. 3256 (RCC), Order dated October 7, 2003 (citing *First City, Texas-Houston, N.A. v. Rafidain Bank,* 150 F.3d 172 (2d Cir. 1998); *Filus v. Lot Polish Airlines,* 907 F.2d 1328 (2d Cir. 1990); *Whiteman v. Fed. Republic of Austria,* 2002 WL 31368236 (S.D.N.Y. Oct. 21, 2002); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah,* 184 F. Supp. 2d 277 (S.D.N.Y. 2001); *Mukaddam v. Permanent Mission of Saudi Arabia to the United Neurons,* 136 F. Supp. 2d 257 (S.D.N.Y. 2001)).

4. Defendant objects to the Interrogatories and the Document Requests to the extent they purport to impose any obligations greater than those imposed by the Federal Rules of Civil Procedure and by the Local Rules of the United States District Court for the Southern District of New York.

5. Defendant objects to the Interrogatories and the Document Requests to the extent they seek information

protected by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege.

SPECIFIC RESPONSES AND OBJECTIONS TO INTERROGATORIES

Interrogatory No. 6

Identify the individual(s), and provide his/her residency status, who have knowledge of the terms of employment and employment contracts for all individuals who were employed by the Mission of India for the period July 1991 to present.

Response to Interrogatory No. 6

Ruchira Kamboj, Counsellor and Head of Chancery posted to the Permanent Mission of India to the United Nations, has knowledge of the terms of employment for individuals employed by the Indian Mission and of the policies and procedures concerning the provision of housing to employees of the Indian Mission. The policies and procedures for provision of housing to employees of the Indian Mission are set forth in the accompanying *Handbook of Rules and Regulations Relating to the Indian Foreign Service,* which was provided to the City on January 16, 2004.

To the extent this interrogatory seeks the identity of each and every person in the world who has some knowledge of the terms of employment for individuals employed at the Indian Mission from July 1991 to the present, India objects to the interrogatory on the basis of the General Objections set forth above and on the grounds that the interrogatory is overbroad, unduly burdensome, beyond

the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

SPECIFIC RESPONSES AND OBJECTIONS TO DOCUMENT REQUESTS

Document Request No. 8

Produce reports, documents, and/or correspondence concerning procedures applicable to residential housing for employees of the Mission of India for the period July 1991 to the present.

Response to Document Request No. 8

The policies and procedures for provision of housing to employees of the Indian Mission are set forth in the accompanying *Handbook of Rules and Regulations Relating to the Indian Foreign Service,* which was provided to the City on January 16, 2004. To the extent this request seeks each and every piece of paper containing a reference to such policies and procedures, India objects to this document request on the basis of the General Objections set forth above and on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 10

For each tenant of record identified in response to Interrogatory No. 11 produce the employment contract, agreements, and/or terms of employment (including but

not limited to documents concerning residential rent subsidies and credits) with the Mission of India or the Indian government for the tenant of record for the period July 1991 to the present.

Response to Document Request No. 10

To the extent this request seeks documents concerning the provision of housing, rent subsidies or credits, the policies and obligations of the Government of India to its employees are set forth in the *Handbook of Rules and Regulations Relating to the Indian Foreign Service,* which was provided to the City on January 16, 2004. To the extent this request seeks employment documents unrelated to the provision of housing for diplomatic personnel identified in the Affidavit of Ruchira Kamboj, India objects to this document request on the basis of the General Objections set forth above and on the basis that it is broader than the scope of discovery permitted by Judge Maas' November 22, 2004 Memorandum Decision in this case, which specifically limited discovery to the particular uses of the property at issue in the case. India also objects to this document request on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 11

For each tenant of record identified in response to Interrogatory No. 11 produce the agreement, lease, correspondence and/or documents regarding the terms and

conditions of occupancy for each residential unit of the subject property for the period July 1991 to present.

Response to Document Request No. 11

The terms and conditions of occupancy for each residential unit of the subject property are set forth in the accompanying *Handbook of Rules and Regulations Relating to the Indian Foreign Service,* which was provided to the City on January 16, 2004. India does not have possession, custody, or control of any agreements and/or leases responsive to this request and states, upon information and belief, that no such documents exist.

To the extent this request seeks each and every piece of paper containing a reference to such terms and conditions, India objects to this document request on the basis of the General Objections set forth above and on the basis that it is broader than the scope of discovery permitted by Judge Maas' November 22, 2004 Memorandum Decision in this case, which specifically limited discovery to the particular uses of the property at issue in the case. India also objects to this document request on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 12

Produce all records, reports, and/or documents maintained by the Mission of India regarding occupants other than tenants of record and/or Mission of India employees at the subject parcel for the period July 1991 to present.

Response to Document Request No. 12

The names, titles, immigration and diplomatic status, and dates of occupancy of each tenant of record is set forth in Exhibit A of the accompanying affidavit of Ruchira Kamboj, Counsellor and Head of Chancery posted to the Permanent Mission of India to the United Nations, which was provided to the City on January 16, 2004. The only occupants other than the tenants of record listed in Exhibit A for the period July 1991 to present have been immediate family members of the tenants of record.

To the extent this request seeks each and every piece of paper containing a reference to tenants of record or their families, India objects to this document request on the basis of the General Objections set forth above and on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 14

Produce all reports, documents, and/or other correspondence prepared by the Mission of India filed with or submitted to the Ministry of Foreign Affairs of the Indian Government regarding residential housing for employees of the Mission of India for the period July 1991 to present.

Response to Document Request No. 14

The names, titles, immigration and diplomatic status, and dates of occupancy of each tenant of record is set forth

in Exhibit A of the accompanying affidavit of Ruchira Kamboj, Counsellor and Head of Chancery posted to the Permanent Mission of India to the United Nations, which was provided to the City on January 16, 2004. To the extent this request seeks additional documents concerning tenants of record or their families, or documents concerning employees of the Indian Mission other than those residing at the subject property, India objects to this document request on the basis of the General Objections set forth above and on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 15

For occupants other than tenants of record or Mission of India employees identified in response to Interrogatory No. 12, produce the agreement, lease, correspondence and/or document regarding terms and condition of occupancy of the residential unit in the subject parcel for the period July 1991 to present.

Response to Document Request No. 15

India does not have possession, custody, or control of any documents responsive to this request and states, upon information and belief, that no such documents exist.

Dated: New York, New York
December 22, 2004

KAYE SCHOLER LLP

By: /s/ Robert A. Kandel
Robert A. Kandel (RK-6120)
John J.P. Howley (JH-9764)
Robert Negron, Jr. (RN-0276)
Attorneys for Defendant
425 Park Avenue
New York, New York 10022
(212) 836-8000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

-against-

No. 03 CV 6086 RCC

THE BAYARYN JARGALSAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, et al.,

AFFIRMATION OF ROBERT NEGRON, JR.

Defendants.

---------- X

ROBERT NEGRON, JR., under penalty of perjury, affirms and says:

1. I am an associate with the law firm of Kaye Scholer LLP, counsel for defendant The Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic in this action, and am personally familiar with the matters set forth herein.

2. I submit this affirmation in support of Defendants' Motion To Dismiss The Amended Complaint For Lack Of Subject Matter Jurisdiction.

3. Attached hereto as Exhibits A-C are copies of documents cited in Defendant's Memorandum Of Law In Support Of Its Motion To Dismiss The Amended Complaint For Lack Of Subject Matter Jurisdiction:

Document	Ex.
Plaintiff's Amended Complaint	A
Affidavit of Gansukh Purevjav	B
Mongolia's Second Supplemental Response To Plaintiff's First Set Of Interrogatories And First Request For The Production Of Documents For The Purpose Of Jurisdictional Discovery	C

Dated: New York, New York
January 10, 2005

KAYE SCHOLER LLP

By: /s/ Robert Negron, Jr.
Robert A. Kandel (RK-6120)
John J.P. Howley (JH-9764)
Robert Negron, Jr. (RN-0276)
Attorneys for Defendant
425 Park Avenue
New York, New York 10022
(212) 836-8000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGAL-SAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, et al.,

Defendants.

---------- x

No. 03 CV 6086 RCC

AFFIDAVIT OF GANSUKH PUREVJAV IN SUPPORT OF MOTION TO DISMISS

GANSUKH PUREVJAV, being duly sworn, deposes and says:

1. I am an employee of the Ministry for Foreign Affairs of the People's Republic of Mongolia (the "Foreign Ministry") serving as the Deputy Permanent Representative to the United Nations as well as Consular Agent. I am personally familiar with the matters set forth herein.

2. My office is located within the Mongolian Mission, 6 East 77th Street, New York, as is my residence which I share with my family. My colleagues, the Ambassador-Permanent Representative, the Councellor, the Third Secretary, the Attache and the administrative officer/driver, likewise have their respective offices and their residences within the Mission.

3. The "Occupancy and Visa History 1980-2004," attached hereto as Exhibit A, shows that since 1980 all persons who have resided in the Mission have been or currently are employees of the Foreign Ministry or members of their families and that the employees held G-1 visas with the exception of the administrative officer/driver who held a G-2 visa. The United States Department of State issues G-1 and G-2 visas to employees of foreign governments assigned to the United Nations.

4. The Foreign Ministry, for its convenience, provides housing within the Mission to its employees posted to the United Nations including the Ambassador- Permanent Representative and the Deputy Permanent Representative, for several key reasons, among others. First, given the time difference between the Mission in New York and the Foreign Ministry in Ulan Bator, Mongolia, the diplomats at the Mission must be available, day and night, to address inquiries and communications from the Foreign Ministry as well as to transmit reports about developments at the United Nations to the Foreign Ministry. Second, the housing of personnel within the Mission fosters a greater concentration of attention by the diplomats and staff on matters pertinent to the Foreign Ministry. Third, having all personnel living within the Mission facilitates providing security to all concerned. Fourth, the provision of housing at the Mission facilitates a more efficient transition between incoming and outgoing diplomats and staff and their families by simplifying the logistics of relocating to the United States from Mongolia. Fifth, given the small Mongolian community within metropolitan New York, the importance of providing the diplomats, the staff and their respective families greater

access to a Mongolian community and Mongolian culture cannot be underestimated.

5. Housing within the Mission is provided to the government employees, including diplomats, administrative officers and members of their families quartered there, without payment by them of any rent or fees; nor is the provision of such housing considered compensation to such employees. The cost of this housing is paid for entirely by the Government of Mongolia for the manifold reasons noted above and in accordance with the relevant decisions, orders and regulations noted below.

6. Since October 5, 2000, the Mongolian Law on Diplomatic Service, and the regulations and orders promulgated and approved thereunder by the Minister for Foreign Affairs and the Minister for Finance and Economy, has required the Government of Mongolia to provide housing free of charge to its employees posted to its missions abroad including the Permanent Mission to the United Nations. Prior to the enactment of that law by the Mongolian Parliament, issues related to the salaries, housing, transportation and other assistance to be provided to diplomats and other employees of the Foreign Ministry posted abroad were governed by the relevant decisions of the Government of Mongolia, such as Government decision No. 41 dated January 26, 1990. The decisions themselves were restated and codified as national law by the Mongolian Parliament in October 2000, as noted.

/s/ [Illegible]
GANSUKH PUREVJAV

Dated: New York, New York
January 12, 2004

Sworn to before me on this 12 day
of January 2004.

/s/ Robert A. Kandel
Notary Public

ROBERT A. KANDEL
Notary Public, State of New York
No. 02KA4521595
Qualified in Westchester County
Commission Expires June 30, 2006

Attachments:

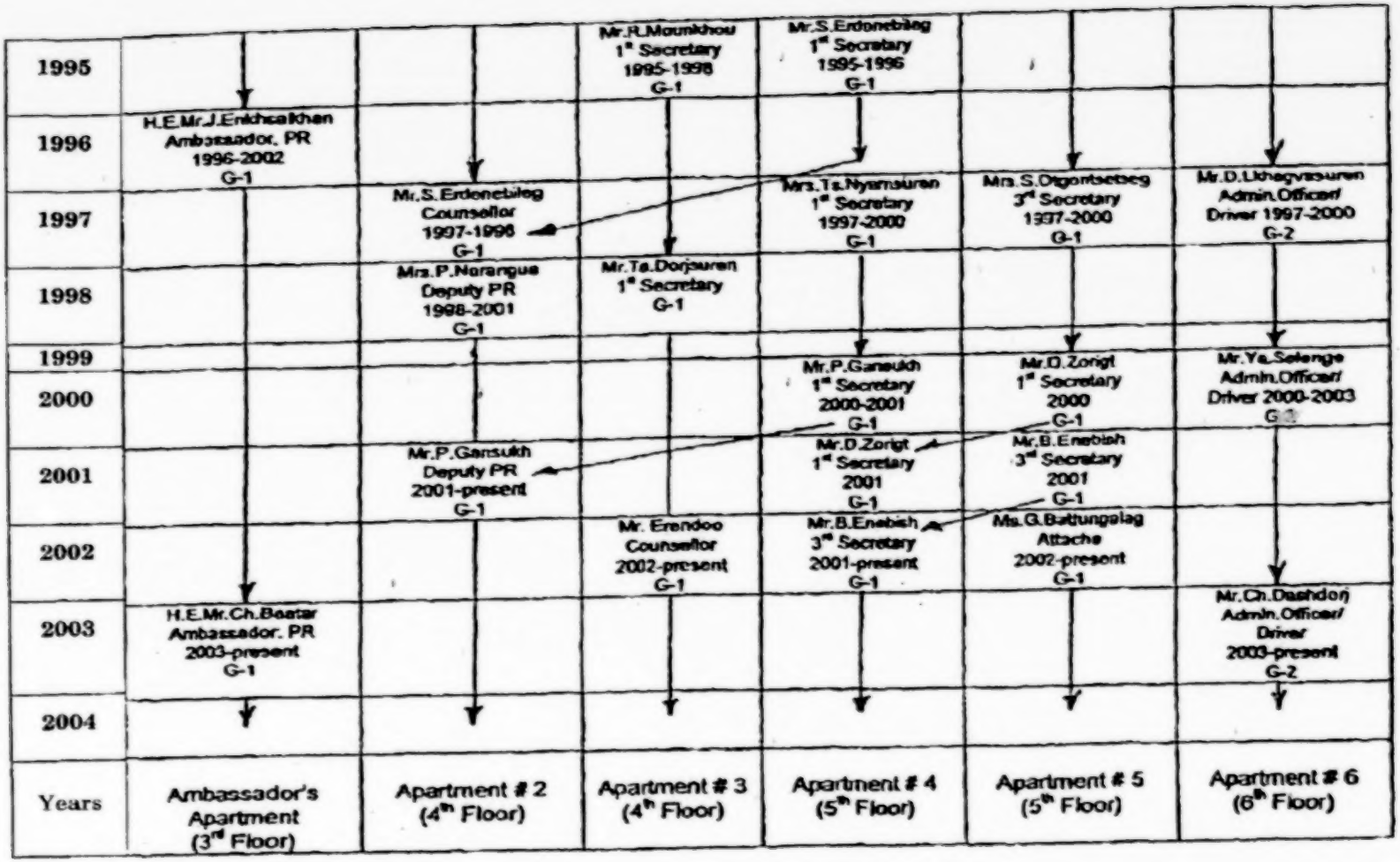
Exhibit A - Occupancy and Visa History 1980-2004

Permanent Mission of Mongolia to the United Nations
Occupancy and Staff Members VISA History
(1980-2004)

Years	Ambassador's Apartment (3rd Floor)	Apartment # 2 (4th Floor)	Apartment # 3 (4th Floor)	Apartment # 4 (5th Floor)	Apartment # 5 (5th Floor)	Apartment # 6 (6th Floor)
1980	H.E.Mr.B.Dashtseren Ambassador, PR 1978-1982 G-1	Mr.L.Erdenechuluun 1st Secretary 1980-1984 G-1	Mr.J.Enkhsaikhan 1st Secretary 1979-1980 G-1	Mr.Ch.Bold 2nd Secretary 1980-1983 G-1	Mr.V.Teegee Attache 1977-1981 G-1	Mr.R.Dugersuren Admin.Officer/ Driver 1979-1981 G-2
1981					Mr.G.Erdembat Attache 1981-1985 G-1	Mr.Kh.Sengee Admin.Officer/ Driver 1981-1986 G-2
1982	H.E.Mr.Ts.Narkhuu Ambassador, PR 1982-1983 G-1					
1983						
1984	H.E.Mr.G.Nyamdoo Ambassador, PR 1984-1988 G-1	Mr.B.Dolgorsuren Deputy PR 1984-1990 G-1				
1985				Mr.J.Gankhuyag Attache 1985-1989 G-1		
1986						Mr.Sh.Dagiisuren Admin.Officer/ Driver 1986-1990 G-2
1987			Mr.R.Mounkhou 3rd Secretary 1987-1991 G-1		Mr.Ts.Achitsaikhan 1st Secretary 1987-1991 G-1	
1988	H.E.Mr.M.Dugersuren Ambassador, PR 1988-1991 G-1					
1989				Mr.T.BatchuUun Attache 1989-1992 G-1		
1990		Mr.L.Erdenechuluun Deputy PR 1990 G-1				Mr.B.Bayarjargal Admin.Officer/ Driver1990-1993 G-2
1991	H.E.Mr.L.Erdenechuluun Ambassador, Acting PR, 1991 G-1		Mr.G.Enkhbold 3rd Secretary 1991-1993 G-1		Mr.Ts.Munkh-Orgil 3rd Secretary 1991-1995 G-1	
1992	H.E.Mr.L.Erdenechuluun Ambassador, PR 1992-1996 G-1	Ms.O.Enkhtsetseg 1st Secretary, Counselor 1992-1997 G-1		Mrs.Ts.Nyamsuren Attache 1992-1993 G-1		
1993			Mr.J.Sukhee 2nd Secretary 1993-1995 G-1			Mr.Ts.Gankhuyag Admin.Officer/ Driver 1993-1997 G-2
1994						

Exhibit A

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1995
1996
1997
1998
1999
2000
2001
2002
2003
2004
Years
H.E.Mr.J.Enkhsaikhan
Ambassador, PR
1996-2002
G-1
H.E.Mr.Ch.Baatar
Ambassador, PR
2003-present
G-1
Ambassador's Apartment (3rd Floor)
Mr.S.Erdenebileg
Counsellor
1997-1998
G-1
Mrs.P.Narangua
Deputy PR
1998-2001
G-1
Mr.P.Gansukh
Deputy PR
2001-present
G-1
Apartment # 2 (4th Floor)
Mr.R.Maunkhou
1st Secretary
1995-1998
G-1
Mr.Ts.Dorjsuren
1st Secretary
G-1
Mr. Erendoo
Counsellor
2002-present
G-1
Apartment # 3 (4th Floor)
Mr.S.Erdenebileg
1st Secretary
1995-1996
G-1
Mrs.Ts.Nyamsuren
1st Secretary
1997-2000
G-1
Mr.P.Gansukh
1st Secretary
2000-2001
G-1
Mr.D.Zorigt
1st Secretary
2001
G-1
Mr.B.Enebish
3rd Secretary
2001-present
G-1
Apartment # 4 (5th Floor)
Mrs.S.Oigontsetseg
3rd Secretary
1997-2000
G-1
Mr.D.Zorigt
1st Secretary
2000
G-1
Mr.B.Enebish
3rd Secretary
2001
G-1
Ms.G.Battungalag
Attache
2002-present
G-1
Apartment # 5 (5th Floor)
Mr.D.Lkhagvasuren
Admin.Officer/
Driver 1997-2000
G-2
Mr.Ya.Selenge
Admin.Officer/
Driver 2000-2003
G-2
Mr.Ch.Dashdon
Admin.Officer/
Driver
2003-present
G-2
Apartment # 6 (6th Floor)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGAL-SAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE #1" through "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

---------- x

No. 03 CV 6086 RCC (FM)

USM5w
SDNY

MONGOLIA'S SECOND SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES AND FIRST REQUEST FOR THE PRODUCTION OF DOCUMENTS FOR THE PURPOSE OF JURISDICTIONAL DISCOVERY

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant The Bayaryn Jargalsaikhan, as

Principal Resident Representative to the United Nations of the Mongolian People's Republic, and the Jane Doe defendants (collectively "Mongolia"), by its attorneys Kaye Scholer LLP, hereby further responds to Plaintiff The City of New York's First Set of Interrogatories (the "Interrogatories") and First Request for the Production of Documents for the Purpose of Jurisdictional Discovery (the "Document Requests") as follows:

PRELIMINARY STATEMENT

Mongolia submits this second supplemental response in an effort to resolve all remaining discovery issues concerning jurisdiction so that the Court may decide the motion to dismiss on sovereign immunity and jurisdictional grounds that has been pending since January 16, 2004. In this regard, Mongolia notes that the City has had since January 16, 2004 a complete list of the names, titles, visa and diplomatic status, and dates of occupancy of each tenant of record in the Permanent Mission of Mongolia to the United Nations (the "Mongolian Mission"), and that since that date the City has also had a sworn affidavit setting forth the policies and procedures by which Mongolia provides such housing, without charge, to those tenants of record. While Mongolia believes that no further information is required to decide the jurisdictional and sovereign immunity issues – and while the City has not described how any additional information would be necessary to decide the jurisdictional and sovereign immunity issues – Mongolia submits this supplemental discovery response solely in the interest of avoiding further delay to the resolution of the motion to dismiss.

GENERAL OBJECTIONS

1. Defendants object to the Interrogatories and the Document Requests to the extent they seek confidential, diplomatic, or other sensitive information. To the extent Defendants agree to produce any information, they agree to do so only pursuant to the protective order dated December 30, 2003, agreed to by the parties and "so ordered" by the Court.

2. Defendants object to the Interrogatories and the Document Requests to the extent they violate Article 24 of the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227 ("Vienna Convention"), which provides that "[t]he archives and documents of the mission shall be inviolable at any time and wherever they may be." *See also 767 Third Avenue Associates v. Permanent Mission of The Republic of Zaire to the United Nations*, 988 F.2d 295, 300 (2nd Cir. 1993) ("History establishes beyond question [] that the Vienna Convention on Diplomatic Relations was intended to and did provide for the inviolability of mission premises, archives, documents, and official correspondence") (citation omitted).

3. Defendants object to the Interrogatories and the Document Requests to the extent they go beyond the scope of the jurisdictional discovery permitted by this Court's Order dated October 7, 2003. *See City of New York v. The Bayaryn Jargalsaikhan, as Principal Resident Representative to the United Nations of the Mongolian People's Republic, et al.*, No. 03 Civ. 6086 (RCC), Order dated October 7,2003 (citing *First City, Texas-Houston, N.A. v. Rafidain Bank*, 150 F.3d 172 (2d Cir. 1998); *Filus v. Lot Polish Airlines*, 907 F.2d 1328 (2d Cir. 1990), *Whiteman v. Fed. Republic of Austria*, 2002 WL 31368236 (S.D.N.Y. Oct. 21,

2002); *Leutwyler v. Office of Her Majesty Queen Rania Al-Abdullah*, 184 F.Supp.2d 277 (S.D.N.Y. 2001); *Mukaddam v. Permanent Mission of Saudi Arabia to the United Nations*, 136 F. Supp. 2d 257 (S.D.N.Y. 2001)).

4. Defendants object to the Interrogatories and the Document Requests to the extent they purport to impose any obligations greater than those imposed by the Federal Rules of Civil Procedure and by the Local Rules of the United States District Court for the Southern District of New York.

5. Defendants object to the Interrogatories and the Document Requests to the extent they seek information protected by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege.

SPECIFIC RESPONSES TO INTERROGATORIES

Interrogatory No. 6

Identify the individual(s), and provide his/her residency status, who have knowledge of the terms of employment and employment contracts for all individuals who were employed by the Mongolian Mission for the years 1980 to present.

Response to Interrogatory No. 6

The Honorable Gansukh Purevjav, former Deputy Permanent Representative of the Mongolian Mission to the United Nations and currently Deputy Director General of the Multilateral Relations Department within the Ministry for Foreign Affairs, has knowledge of the policies and procedures concerning the provision of housing to employees of the Foreign Ministry including those who

work and reside in the Mongolian Mission. The policies and procedures for provision of housing to employees of the Mongolian Mission are set forth in the accompanying affidavit of Mr. Gansukh, which was provided to the City on January 16, 2004 (the "Affidavit of the Honorable Gansukh Purevjav") (Exhibit A). Mongolia is not aware that any individuals have knowledge of "employment contracts for all individuals who were employed by the Mongolian Mission for the years 1980 to present."

To the extent this interrogatory seeks the identity of each and every person in the world who has some knowledge of the terms of employment for individuals employed at the Mongolian Mission from 1980 to the present, Mongolia objects to the interrogatory on the basis of the General Objections set forth above and on the grounds that the interrogatory is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Interrogatory No. 14

Identify the location of documents, reports and/or correspondence of the Mongolian Mission filed with or sent to the Ministry of Foreign Affairs of the Mongolian government, regarding the residential units in the subject parcel for the period 1980 to present.

Response to Interrogatory No. 14

To the extent any such documents exist, they are located in the archives of the Permanent Mission of the Mongolian People's Republic to the United Nations.

SPECIFIC RESPONSES TO DOCUMENT REQUESTS

Document Request No. 7

Produce the employment manual, and any additions, modifications and updates thereto, applicable to employees of the Mongolian Mission who resided within the residential units of the subject parcel from 1980 to the present.

Response to Document Request No. 7

Mongolia does not have possession, custody, or control of any documents responsive to this request and states, upon information and belief, that no such documents exist.

Document Request No. 8

Produce reports, documents and/or correspondence concerning procedures applicable to residential housing for employees of the Mongolian Mission for the period 1980 to the present.

Response to Document Request No. 8

The policies and procedures for provision of housing to employees of the Mongolian Mission are set forth in the Affidavit of the Honorable Gansukh Purevjav, Exhibit A hereto, which was provided to the City on January 16, 2004. As stated in that affidavit, since October 5, 2000 the *Mongolian Law on Diplomatic Service,* and the regulations and orders promulgated and approved thereunder by the Minister for Foreign Affairs and the Minister for Finance and Economy, has governed the provision of housing free of charge to employees of the Government of Mongolia posted to its missions abroad including the Mongolian

Mission. An official English translation of the *Mongolian Law on Diplomatic Service* is attached hereto as Exhibit B. Prior to the enactment of that law by the Mongolian Parliament, issues related to the salaries, housing and other assistance to be provided to diplomats and other employees of the Foreign Ministry posted abroad were governed by the relevant decisions of the Government of Mongolia. A copy of Government decision No. 41, dated January 26, 1990, is attached hereto as Exhibit C together with an unofficial translation of that portion of the decision that addresses the housing of the members of diplomatic missions. To the extent this request seeks each and every piece of paper containing a reference to such policies and procedures, Mongolia objects to this document request on the basis of the General Objections set forth above and on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 10

For each tenant of record identified in response to Interrogatory No. 11 produce the employment contract, agreements and/or terms of employment (including but not limited to documents concerning residential rent subsidies and credits) with the Mongolian Mission or the Mongolian government for the tenant of record for the period 1980 to the present.

Response to Document Request No. 10

To the extent this request seeks documents concerning the provision of housing, rent subsidies or credits, the policies and obligations of the Government of Mongolia to its employees is set forth in the *Mongolian Law on Diplomatic Service,* Exhibit B hereto, and in Government decision No. 41, Exhibit C hereto. To the extent this request seeks employment documents for diplomatic personnel identified in the Affidavit of the Honorable Gansukh Purevjav, Mongolia objects to this document request on the basis of the General Objections set forth above. Mongolia also objects to this document request on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 11

For each tenant of record identified in response to Interrogatory No. 11 produce the agreement, lease, correspondence and/or documents regarding the terms and conditions of occupancy of the tenant in each residential unit of the subject property for the period 1980 to present.

Response to Document Request No. 11

Mongolia does not have possession, custody, or control of any documents responsive to this request and states, upon information and belief, that no such documents exist with the exception of the *Mongolian Law on Diplomatic Service,* Exhibit B hereto, and Government decision No. 41, Exhibit C hereto.

Document Request No. 12

Produce all records, reports, and/or documents maintained by the Mongolian Mission regarding tenants of record and/or occupants other than tenants of record and Mongolian Mission employees at the subject parcel for the period 1980 to the present.

Response to Document Request No. 12

The names, titles, immigration and diplomatic status, and dates of occupancy of each tenant of record is set forth on Exhibit A to the accompanying Affidavit of the Honorable Gansukh Purevjav, which was provided to the City on January 16, 2004. To the extent this request seeks each and every piece of paper containing a reference to tenants of record or their families, Mongolia objects to this document request on the basis of the General Objections set forth above and on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 14

Produce all reports, documents, other correspondence prepared by the Mongolian Mission filed with or submitted to the Ministry of Foreign Affairs of the Mongolian Government regarding residential housing for employees of the Mongolian Mission for the period 1980 to the present.

Response to Document Request No. 14

The names, titles, immigration and diplomatic status, and dates of occupancy of each tenant of record is set forth on Exhibit A of the accompanying Affidavit of the Honorable Gansukh Purevjav, which was provided to the City on January 16, 2004. To the extent this request seeks additional documents concerning tenants of record or their families, Mongolia objects to this document request on the basis of the General Objections set forth above and on the grounds that the request is overbroad, unduly burdensome, beyond the scope of the Court's order limiting discovery to jurisdictional issues, and not reasonably calculated to lead to discovery of admissible evidence related to jurisdiction.

Document Request No. 15

For occupants other than tenants of record and Mongolian Mission employees identified in response to Interrogatory No. 12, produce the agreement, lease, correspondence and/or document regarding terms and condition of occupancy of the residential unit in the subject parcel for the period 1980 to the present.

Response to Document Request No. 15

Mongolia does not have possession, custody, or control of any documents responsive to this request and states, upon information and belief, that no such documents exist.

Dated: New York, New York
November 17, 2004

KAYE SCHOLER LLP

By: /s/ Robert A. Kandel

Robert A. Kandel (RK-6120)
John J.P. Howley (JH-9764)
Robert Negron, Jr. (RN-0276)
Attorneys for Defendants
425 Park Avenue
New York, New York 10022
(212) 836-8000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, et al.,

Defendants.

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DECLARATION OF JOHN R. LOW-BEER IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

No. 03 CV 3256 (RCC)

JOHN R. LOW-BEER declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for plaintiff.

2. I submit this Declaration in opposition to defendant's motion to dismiss for lack of subject matter jurisdiction.

3. Attached hereto as Exhibits A-D are copies of documents cited in Plaintiff's Memorandum Of Law In Opposition To Defendant's Motion To Dismiss:

Document	**Ex.**
U.S. Dept. of State, *Guidance for Administrative Officers* § 7.8 (Jan. 4, 2004) (downloaded Feb. 1, 2005 from http://www.state.gov/documents/organization/27910.pdf)	A

Diplomatic Note HC-06-93 (Feb. 17, 1993)	B
Diplomatic Note HC-18-93 (Apr. 14, 1993)	C
Diplomatic Note HC-12-01 (Apr. 5, 2001)	D

Dated: New York, New York
February 7, 2005

/s/ John R. Low-Beer
JOHN R. LOW-BEER
(JL 3755)

United States Department of State

[LOGO]

FOREIGN DIPLOMATIC AND CONSULAR PERSONNEL IN THE UNITED STATES

Guidance for Administrative Officers

This is the first revision of ***Guidance for Administrative Officers*** which superseded the publication, ***Handbook for Diplomatic and Career Consular Personnel in the United States***, Department of State Publication 9886.

DEPARTMENT OF STATE PUBLICATION 10576
Office of Foreign Missions
and the
Office of Protocol
December 2003

Foreword

This publication is intended primarily for the use of the administrative officer at a diplomatic or consular mission, or international organization who traditionally is involved in assisting the mission's personnel and family members during their stay in the United States in obtaining services from the Department of State. The responsibilities for the administration of relations between the United States and foreign missions are divided between the Office of Protocol and the Office of Foreign Missions. ***Guidance for Administrative Officers*** provides summary guidance on obtaining services from each office.

We anticipate there will be changes to this electronic publication whenever significant changes in policy or procedure occur. These changes will be announced on the Office of Foreign Missions home page (http://www.state.gov/ofm), and hyperlinks to them will be provided.

This edition of ***Guidance for Administrative Officers*** is available only in electronic format.

Comments and inquiries regarding this publication should be directed to (202) 895-3544 or OFMinfo@state.gov.

Section 7 – Real Property Transactions and Property Tax Exemptions

The Office of Foreign Missions (OFM) reviews and controls the acquisition of real property in the United States by foreign missions and international organizations in accordance with the Foreign Missions Act.

This section provides general information and guidelines to assist foreign governments in complying with federal laws when they acquire diplomatic and consular property in the United States and its territories.

7.1 Chancery Location

All properties meant for use as a chancery or chancery annex are traditionally located in the District of Columbia, the Department will consider other locations in the Washington Metropolitan Area on a case-by-case basis.

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7.2 Locating New Property

Foreign governments should identify their needs as to location, space, security, and future expansion. A competent real estate agent/broker familiar with zoning regulations and areas suitable for the location of chancery offices should be contacted to assist in finding an available property.

7.3 Notifying the Office of Foreign Missions

All foreign missions are required to inform OFM by diplomatic note ***before*** the purchase, lease, or sale of real estate in the United States, as well as alterations or additions to existing premises. Under U.S. law, all such transactions are subject to disapproval by the Department. Consular posts have the option of notifying the appropriate OFM regional office by letter rather than by diplomatic note through their mission in Washington.

Diplomatic notes and all correspondence relating to real estate transactions and property tax exemption should be sent to:

Office of Foreign Missions
Real Property Section,
Room 2238
Office of Foreign Missions
U.S. Department of State
2201 C Street, N.W.
Washington, DC 20520
Telephone number (202) 647-4554

Also, please fax copies of all such correspondence to (202) 647-1919.

Consular posts may address correspondence on property related issues to the appropriate OFM regional office.

Although OFM has 60 days following the receipt of such notification in which to respond, a response to most requests will be made within 10 working days.

7.4 Locations and Zoning

In the District of Columbia, chanceries or chancery annexes may be located, replaced, or expanded in both "matter of right" areas and "non-matter of right" areas. "Matter of right" areas are zoned commercial (C), industrial (CM and M), waterfront (W), or mixed-use (CR); "non-matter of right" areas include zoned special-purpose (SP) and certain residential areas (R) in the special diplomatic overlay zone. For chanceries located outside the District of Columbia, a mission must comply with the zoning and land use laws applicable in the local jurisdiction.

As a general matter chanceries may be located in "non-matter of right" areas ***only*** after a review by the Foreign Missions Board of Zoning Adjustment (BZA), set up under the Foreign Missions Act to review the location of chanceries in certain areas of the District of

Columbia. The BZA process includes a public hearing. All missions which appear before the Board should have legal representation. A BZA review may also be required if an expansion or renovation of existing chancery properties is required.

A BZA review is generally not necessary for occupancy of properties located in "matter of right" areas. However, the mission is required to obtain an Occupancy Permit from the government of the District of Columbia (accomplished with the assistance of OFM).

The complexity of the zoning process with regard to the purchase or lease of chanceries or chancery annexes requires missions to work closely with OFM ***before*** committing substantial time or financial resources to a chancery project.

Properties intended solely for residential use may be located throughout the Washington metropolitan area. Authorization from OFM is required and, if construction or renovation is considered, the necessary local jurisdiction's permits and certificates must be obtained.

7.5	Occupancy Permits	A "Certificate of Occupancy" permit must be obtained from the Government of the District of Columbia before occupying office space for chancery use.
7.6	Procedures for Missions to the UN	Missions to the United Nations (UN) follow similar procedures when requesting approval to acquire official property for their office or residential use. UN missions should submit requests to the OFM New York Regional Office.
7.7	To Acquire Property Outside Washington, DC	Foreign missions are required to obtain prior authorization from OFM before acquiring property for use as consular offices and residences. Missions should be aware that property acquired for use as consular office space is subject to the zoning laws and regulations of the local jurisdiction where the property is located. Information regarding local jurisdictional regulations and real estate taxes may be obtained from local authorities or from the OFM regional office which services that area.
7.8	Real Estate Tax Exemption Program	In accordance with the Vienna Convention on Diplomatic Relations (VCDR) and the Vienna Convention on Consular Relations (VCCR), property held in the name of a foreign government for use as its chancery, chancery annexes,

consulates, or as the residence of the chief of mission or the career head of a consular post enjoys exemption from all national, regional, and municipal dues and taxes. In 1987, exemption from dues and taxes was extended on a reciprocal basis to other foreign government-owned residences used to house members of diplomatic missions in the Washington metropolitan area.

Absent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations, except, as noted above, for career heads of the consular posts or chiefs of missions to the international organizations.

In the Washington metropolitan area, property tax exemption is obtained through OFM. When a mission submits a request for exemption from real estate taxes, the diplomatic note should include the address of the property, its lot and square number, a description of the property's function, and the date the deed was recorded with the local government. In order to qualify for exemption from real estate taxes, the deed must be titled in the name of the mission with ***one*** exception: when the chief

of mission resides in his personally owned residence. Otherwise, personally owned residences do not enjoy tax exemption.

In New York City, property tax exemption is filed directly with the New York City Department of Fi nance Exemption Unit. The OFM New York Regional Office can provide more detailed information.

The missions are reminded that exemption from real estate taxes ***does not include exemption from charges for services*** such as the collection of refuse or any other separately identified charges for specific commodities or services that may appear on the tax bill.

7.9 Transfer and Recordation Tax Exemption for Properties in the Washington Metropolitan Area (except Montgomery County, Maryland – see section 7.10)

On the basis of the VCDR and reciprocity, OFM will request exemption from transfer and recordation taxes associated with the purchase or sale of property in the Washington Metropolitan Area. The procedures for obtaining such exemptions vary in the three jurisdictions (District of Columbia, Virginia, and Maryland).

Transfer taxes are normally the responsibility of the seller and recordation taxes the responsibility of the buyer. The governments of the areas listed above will exempt a mission from payment of the recordation tax where the mission is purchasing property and payment

of the transfer tax where the mission is selling its property. The mission should request such an exemption through OFM before the settlement date of the purchase. OFM will prepare a letter supporting exemption which should be submitted at the time of settlement.

7.10 Montgomery County, Maryland one-time Tax Exemption

Although missions are also entitled to exemption from transfer and recordation taxes in the state of Maryland which they otherwise would be obligated to pay, the procedures are more complicated than in the District of Columbia. When a foreign mission is a purchaser of property located in Montgomery County, Maryland, the mission is entitled to exemption from one hundred percent (100%) of the County Transfer Tax and fifty percent (50%) of the Maryland State Transfer Tax. In contrast, when a foreign mission is selling property it owns in Montgomery County, Maryland, it will obtain no exemption from the County Transfer Tax, and will obtain exemption from fifty percent (50%) of the Maryland Transfer Tax. Missions should prepare their purchase and sale contracts accordingly. If additional information is required, missions may contact the Real Estate Office of OFM.

7.11 Applying for Annually Recurring Property Tax Exemption

After settlement a foreign mission may also request exemption from property taxes. If OFM determines that exemption is appropriate, it will submit a request for exemption directly to the taxing authority in the District of Columbia, Maryland, and Virginia. In the District of Columbia, the mission must complete a "Foreign Government Information Request Form" and include it with the written request for tax exemption submitted to OFM. OFM will complete the reverse of the form before transmitting it (with a cover letter) to the DC Department of Finance and Revenue. The effective date of the real estate tax exemption is determined by the date the deed to the property is recorded with the DC Recorder of Deeds.

UNITED STATES MISSION
TO THE UNITED NATIONS

February 17, 1993

HC-06-93

The United States Mission to the United Nations presents its compliments to the Permanent Mission of India to the United Nations and has the honor to inform the latter that the Office of Foreign Missions has no objection to the relocation of the Permanent Mission to the building owned by the Government of India at 235 East 43rd Street in New York City.

The United States Mission is concerned, however, that the new space was occupied while the Department of State was reviewing the Permanent Mission's note of January 6, 1993, and before the expiration of sixty days as required by the Foreign Missions Act. As the Permanent Mission of India is aware, such action is a violation of United States law (Title 22, United States Code, Section 4305) and the policies of the Department of State.

The Mission is informed that the physical arrangements in the building should insure the separate and distinct status of the Permanent Mission and each of the mission or consular [illegible], as these entities enjoy a distinct legal status and, consequently, a different level of privileges and immunities under international and United States law. External and internal signs should clearly indicate the different premises.

The Mission is reminded, that exemption from property taxes is available only for that portion of the building used to house the Permanent Mission, which the United States Mission understands will occupy the first four

floors of the building, and the residences of the Permanent Representative and the Consul General. The remainder of the building (including common areas such as lobbies, common corridors and stairwells, parking spaces, and common basement) will be subject to New York City property taxes. Therefore, the Mission is encouraged to work with the City of New York to allocate the taxable and non-taxable portions of the structure and settle other outstanding tax issues relating to the property.

The Permanent Mission is further reminded that physical inviolability will extend only to the premises of the Permanent Mission and residences of the diplomatic members of the Permanent Mission. All other residences and areas, including common areas, lack such protected legal status.

Should the Government of India intend to use the building for purposes other than for the Permanent Mission and residences of members of the Permanent Mission and consular post, advance notification to the United States Mission of the proposed change would be required.

The United States Mission to the United Nations avails itself of this opportunity to renew to the Permanent Mission of the India to the United Nations the assurances of its highest consideration.

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HC:RCMoller [/s/ R]
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2/17/93

cc: Subject/Chron/Board
HMAllen
Reference
OFH/NY
IO/UNP-Boesel (via pouch)

UNITED STATES MISSION
TO THE UNITED NATIONS

April 14, 1993

HC-18-93

The United States Mission to the United Nations presents its compliments to the Permanent Missions and Offices of the Permanent Observers to the United Nations and has the honor to restate polices and procedures regarding the application of the Foreign Missions Act (Title of Public Law 97-241, 22 United States Code 4301 et seq.) to real property of foreign Missions in the United States. The subject was last brought to the attention of the Permanent Missions and the offices of the Permanent Observers to the United Nations in circular diplomatic notes of January 19, 1983 and May 15, 1987.

Notification Requirement

Pursuant to Section 4305 of the Foreign Missions Act (The Act), all foreign Missions, including any Mission to an International Organization, are obligated to notify the Department of State prior to a proposed lease, purchase, sale or other acquisition or disposition of real property in the United States by or on behalf of a foreign Mission. Under Section 4305 all such transactions are subject to disapproval by the Department of State.

The notification requirement applies to properties acquired for office or residential use by the foreign government for its Permanent Mission to the United Nations. In addition to the lease or purchase of new property, proposals for the alteration, addition, or change in purpose of existing properties are also considered acquisitions under the Act

and must be submitted to the Department of State for review.

Missions should notify the United States Mission to the United Nations of proposed acquisitions as early in the process as possible. Missions which obtain the benefit of the Department of State's experience and advice in the early stages of acquisitions may avoid unnecessary financial or legal complications.

Procedure

The review process is initiated by the delivery of a diplomatic note to the Host Country Affairs Office of the United States Mission to the United Nations. A copy may also be sent to the New York Office of Foreign Missions. At a minimum the note should include:

1. The exact address of the property, including apartment or suite number;

2. The proposed use of the property, i.e., Mission, Mission annex, residence;

3. The method of acquisition, i.e., purchase, lease, lease term.

After receipt of the diplomatic note, the Foreign Missions Act allows the Department of State up to sixty (60) days to review the request. In most instances, a response will be provided well before the expiration of the sixty day period, normally in two to three weeks. In some cases, however, the full review period may be required and Missions are therefore encouraged to submit notifications as far in advance as possible.

Prior to receiving a response from the United States Mission to the notification, or prior to the expiration of the sixty day period, a Mission may not enter into a contract or lease agreement unless the agreement expressly states that the execution of the agreement is subject to disapproval by the Department of State.

Property for Mission Use

Property acquired by Missions to the United Nations for mission purposes are to be used in their entirety for the purposes prescribed. Property approved for Mission use should not be used by other government offices, or leased or otherwise put to commercial use, even in part, without the express consent of the Department of State.

The approval process of the government of the City of New York for the use of new properties for Mission purposes, or for alterations to existing properties, is separate from, and in addition to, the approval of the Department of State. The purchase, alteration, and use of Mission premises are subject to compliance with applicable local land use and building laws and regulations. Missions are expected to obtain the appropriate municipal permits for the construction, alteration, and/or the occupancy of new office space, before construction begins or new space is occupied.

Property for Residential Use

All apartments for houses leased or purchased in the name of Missions to the United Nations for residential use by members of the Mission are subject to the Department of State notification requirements under section 4305 of the Act. The

purchase and use of residential properties is also subject to compliance with the applicable laws and regulations of the local jurisdiction and, as with properties for Mission use, the alteration or expansion of such properties is subject to the prior notification requirements of the Department of State and to compliance with local building codes and regulations.

Property Tax Exemption

The Permanent Representatives are reminded that any portion of property which is not used for diplomatic purposes of that sending state will not benefit from tax exemption or inviolability. Foreign Governments are entitled to exemption from real estate taxes on properties owned by the Government and used by its Permanent Mission to the United Nations. Such properties include the Permanent Mission, Mission annexes, and the residence of the Permanent Representative.

Exemption from taxation does not include exemption from fees separately stated on a property tax bill which relate to services to the property. Typical examples of such services include utilities, water, sewerage and refuse collection. Such charges are separately stated on the tax bill and must be paid. Private contractors and attorneys should be informed that applications for building and construction permits, certificates of occupancy and property tax exemptions for the City of New York should be submitted, along with a copy of the Mission's diplomatic note to the United States Mission, to the General Counsel, New York City Commission for the United Nations and Consular Corps, 2 United Nations Plaza, 27th Floor, New York, New York 10017.

Inquiries relating to United States Government policy and procedures described in this note may be directed to the United States Mission to the United Nations, telephone (212) 415-4156.

The United States Mission to the United Nations avails itself of this opportunity to renew to the Permanent Missions and Offices of the Permanent Observers to the United Nations the assurances of its highest consideration.

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cc: HC Chron
HC Country
HC Board
HC Subject
HC Country
Reference
OFM/New York
IO/UNP-Boesel (via Pouch)
HC Officers

wang # 1288/baf

UNITED STATES MISSION
TO THE UNITED NATIONS

April 5, 2001

HC-12-01

The United States Mission to the United Nations presents its compliments to the Permanent Missions to the United Nations and has the honor to refer to the issue of taxation of real property owned by diplomatic missions and located in the State of New York:

New York State Real Property Tax Law 418 provides that

> "Real property of a foreign government which is a member of the United Nations . . . , the legal title to which stands in the name of such foreign government or the principal resident representative or resident representative with the rank of ambassador or minister plenipotentiary of such foreign government . . . , used exclusively for the purposes of maintaining offices or quarters, for such representatives, or offices for the staff of such representatives, shall be exempt from taxation, except levies made on a city-wide or borough-wide basis which are collectible with the property tax. . . . If a portion only of any lot or building of any such government or representative is used exclusively for the purposes herein described, then such portion only shall be exempt and the remainder shall be subject to taxation unless otherwise exempt front taxation by law."

Pursuant to the referenced Law, and consistent with international law, the United States Mission offers the following examples for the convenience of the Permanent Missions:

With Regard to Office Premises

If the Permanent Mission occupies office space in a building owned by itself or by the Government of the sending state all that portion of the building used to perform official functions of the Mission is exempt from New York property tax. If a portion of that same building is also occupied by the Consulate General of the same state, the consular office space is also exempt from New York property tax under the Vienna Convention on Consular Relations. On the other hand, those portions of the building that may be rented or leased to other entities – even if that entity is another Permanent Mission to the United Nations – is subject to New York property tax. The same is true for space occupied by the offices of the national airline, other government corporations of a commercial nature, or any private commercial tenants.

If a bilateral agreement specifically regarding property taxation exists between the United States and the Government represented by the Permanent Mission, exemption from property tax in the State of New York is controlled by that bilateral agreement in precedence to Real Property Tax Law 418.

With Regard to Residential Premises

If the Permanent Representative resides in a building or house owned by the Mission or the sending state, or if the title to the property stands in the name of the Permanent Representative, that residence is exempt from New York property tax. The government- or mission-owned residence of any individual at the Permanent Mission with the title of Ambassador or Minister Plenipotentiary, or titled in the name of Ambassador or Minister-Plenipotentiary, and

occupied by such a person, is also exempt from property tax under New York Real Property Tax Law 418. The residence or the Chief of Mission of a consular post enjoys tax exemption under the Vienna Convention on Consular Relations. All other residential property owned by the Permanent Mission or the sending state and occupied by a diplomat or mission member of lesser rank is subject to property tax, unless an existing bilateral agreement between the sending state and the United States provides for exemption from property tax.

Exemption from New York property tax may be secured by an application to the local taxing authority. Permanent Missions may wish to contact the United States Mission for further information in this regard. It is also important to remember that water, sewer, or frontage taxes are not in fact taxes but rather charges for municipal services provided to the building or the property. Payment for these services must of course be made.

The United States, Mission to the United Nations avails itself of this opportunity to renew to the Permanent Missions to the United Nations the assurances of its highest consideration.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGAL-SAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, et al.,

Defendants.

----------x

DECLARATION OF JOHN R. LOW-BEER IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

No. 03 CV 6086 (RCC)

JOHN R. LOW-BEER declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following is true and correct:

1. I am an Assistant Corporation Counsel in the office of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for plaintiff.

2. I submit this Declaration in opposition to defendant's motion to dismiss for lack of subject matter jurisdiction.

3. Attached hereto as Exhibits A-D are copies of documents cited in Plaintiff's Memorandum Of Law In Opposition To Defendant's Motion To Dismiss:

Document	**Ex.**
U.S. Dept. of State, *Guidance for Administrative Officers* § 7.8 (Jan. 4, 2004) (downloaded Feb. 1, 2005 from http://www.state.gov/documents/organization/27910.pdf)	A
Diplomatic Note HC-12-01 (Apr. 5, 2001)	B
Diplomatic Note HC-1 8-93 (Apr. 14, 1993)	C
Diplomatic Note HC-06-93 (Feb. 17, 1993)	D

Dated: New York, New York
February 7, 2005

/s/ John R. Low-Beer
JOHN R. LOW-BEER
(JL 3755)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, GREAT AMERICA LEASING CORPORATION, and "JANE DOE #1" "JANE DOE #20", the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

----------X

No. 03 CV 3256 RCC

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant The Permanent Mission of India to the United Nations appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action on July 8, 2005, denying Defendant's motion to dismiss, *inter alia*, for lack of jurisdiction under the Foreign Sovereign Immunities Act.

Dated: New York, New York
August 5, 2005

KAYE SCHOLER LLP

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

THE CITY OF NEW YORK,

Plaintiff,

-against-

THE BAYARYN JARGAL-SAIKHAN, AS PRINCIPAL RESIDENT REPRESENTATIVE TO THE UNITED NATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC, and "JANE DOE # 1" JANE DOE # 20" the names of the last 20 defendants being unknown to plaintiff, the persons or parties intended to be, persons or corporations, if any, having or claiming an interest in or lien upon the property described in the complaint,

Defendants.

----------X

No. 03 CV 6086 (RCC)

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant The Bayaryn Jargalsaikhan, as Principal Representative to the United Nations of the Mongolian People's Republic, appeals to the United States Court of Appeals for the Second Circuit from the Order entered in this action on July 8, 2005, denying Defendant's motion to dismiss, *inter alia*, for lack of jurisdiction under the Foreign Sovereign Immunities Act.

Dated: New York, New York
August 5, 2005

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No. 06-134

Supreme Court, U.S.
FILED
FEB 23 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS AND THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Does the exception to sovereign immunity for cases "in which . . . rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality's lawsuit seeking to declare the validity of a tax lien on a foreign sovereign's real property when the municipality does not claim any right to own, use, enter, control or possess the real property at issue?

2. Is it appropriate for U.S. courts to interpret U.S. statutes by relying on international treaties that have not been signed by the U.S. Government and that do not accurately reflect international practice because they have only been signed by a limited number of other nations?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner The Permanent Mission of India to the United Nations is an agency and instrumentality of The Republic of India, a sovereign state.

Petitioner The Permanent Representative of Mongolia to the United Nations is an agency and instrumentality of Mongolia, a sovereign state.

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FEDERAL CASES

Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985) 17, 18, 31, 32

Bertie's Apple Valley Farms v. United States, 476 F.2d 291 (9th Cir. 1973) 34

Butters v. Vance International, Inc., 225 F.3d 462 (4th Cir. 2000) 39

City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31 (3d Cir. 1985) 7, 8

City of New York v. The Permanent Mission of India, et al., 376 F. Supp. 2d (S.D.N.Y. 2005) 1

City of New York v. The Permanent Mission of India, et al., 446 F.3d 365 (2d Cir. 2006) 1

Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) 33

Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984) 37

Fagot-Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002) 32

Foremost McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 6

Foster v. Neilson, 27 U.S. 253 (1829) 25

Kosak v. United States, 465 U.S. 848 (1984) 16

Logan v. Dupuis, 990 F. Supp. 26 (D.D.C. 1997) 28

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MacArthur Area Citizens Association v. Republic of Peru, 809 F.2d 918 (D.C. Cir. 1987) 33

Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) 37

National City Bank v. Republic of China, 348 U.S. 356 (1948) 22

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 6

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 6, 10, 17, 39

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 14

Saudi Arabia v. Nelson, 507 U.S. 349 (1993) ... 13, 14, 16, 39

Sheridan v. United States, 487 U.S. 392 (1988) 16

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 23

TVA v. Hill, 437 U.S. 153 (1973) 13, 37

The Paquete Habana, 175 U.S. 677 (1900) 23

United States v. City of Glen Cove, 322 F.Supp. 149 (E.D.N.Y. 1971) 22

United States v. Gonzales, 520 U.S. 1 (1997) 27

United States v. Langston, 118 U.S. 389 (1886) 37

United States v. Price, 361 U.S. 304 (1960) 36

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 14

Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354 (2d Cir. 1964) 39

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STATE CASES

Foreign Ministry of the Kingdom of Denmark v. City of Los Angeles, SC 079161 (Cal. Sup. Ct., L.A. Co. 2004) 37

Marine Midland Bank v. Marcal Enterprises, Inc., 398 N.Y.S.2d 782 (N.Y. Co. Ct. 1977), *aff'd per curiam* 407 N.Y.S.2d 833 (N.Y. App. Div. 1978) 34

Republic of Argentina v. City of New York, 25 N.Y.2d 252 (N.Y. 1969) ..... *passim*

Weinstein v. Taylor, 234 N.Y.S.2d 926 (N.Y. Sup. Ct. 1962), *aff'd mem.*, 242 N.Y.S.2d 707 (N.Y. App. Div. 1963) 34

FEDERAL STATUTES, U.S. TREATIES, AND RELATED MATERIALS

12 Weekly Comp. Pres. Doc. 1554 (Oct. 22, 1976) 29

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28 U.S.C. § 1441 4

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28 U.S.C. § 2680 16

150 Cong. Rec. S 9560-61 (daily ed. Sept. 23, 2004) 36

Consolidated Appropriations Act of 2005, Pub. L. 108-447, 118 Stat. 2809 13

Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, Pub. L. 109-102, 119 Stat. 2172 ..... 13, 36

H.R. Rep. No. 94-1487 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604 ..... *passim*

TABLE OF AUTHORITIES – Continued

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Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. (1973) 31

Jurisdiction of U.S. Courts in Suits Against United States: Hearings on H.R. 11315 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 94th Cong. (1976) 26, 29

Vienna Convention on Diplomatic Relations, *done* April 18, 1961, 23 U.S.T. 3227 .....4, 12, 27, 28, 30

STATE AND MUNICIPAL STATUTES

N.Y. Real Prop. Tax Law § 418 3

NYC Ad. Code § 11-301 4

INTERNATIONAL CASES, TREATIES, AND RELATED MATERIALS

Council of Europe, European Convention on State Immunity: Explanatory Report 23, 24, 25

Documents of the Thirty-Fifth Session, [1983] 2 Y.B. Int'l L. Comm'n 48, U.N. Doc. A/CN.4/SER.A/1983 19

European Convention on State Immunity, *opened for signature* May 16, 1972, 11 I.L.M. 470... 11, 23, 25, 27

Reference re Tax on Foreign Legations, [1943] 2 D.L.R. 481 (Can.).....11, 21, 22

Special Rapporteur's Sixth Report on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/CH.4/376, January 31, 1984 25

TABLE OF AUTHORITIES – Continued

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Summary Records of Meetings of the 2220th Meeting, [1991] 1 Y.B. Int'l L. Comm'n 84, U.N. Doc. A/CN/4 25

United Nations Convention on Jurisdictional Immunities of States and Their Property, *opened for signature* Jan. 17, 2005, 44 I.L.M. 803 ..... 11, 23, 24, 25, 26

MISCELLANEOUS

2 Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2d ed. 1945) 17

Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (2d ed. 1998) 28, 30

Eleanor W. Allen, *The Position of Foreign States Before National Courts* (1932) 21

John W. Foster, *The Practice of Diplomacy* (1906) 21

Restatement (First) of Property (1944) 34

Restatement (Second) of Foreign Relations Law (1965) 10, 18, 19, 20, 22

Sovereign Immunity, 6 Whiteman *Digest* (1968) 18, 19

OPINIONS BELOW

The initial decision of the United States District Court for the Southern District of New York, dismissing Petitioners' motion to dismiss for lack of subject matter jurisdiction (Pet. App. 25-45), is reported at 376 F. Supp. 2d 429. The decision of the United States Court of Appeals for the Second Circuit affirming that dismissal (Pet. App. 1-24) is reported at 446 F.3d 365.

JURISDICTION

The judgment of the court of appeals was entered on April 26, 2006. The petition for a writ of certiorari was filed on July 25, 2006, and was granted on January 19, 2007. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Foreign Sovereign Immunities Act of 1976 (FSIA), those contained in 28 U.S.C. § 1605, are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 46-52).

STATEMENT

The Petitioners are the accredited representatives to the United Nations of the sovereign states of India and Mongolia. Both India and Mongolia own Mission buildings in New York City, which are used solely for official offices and to house diplomatic personnel and their immediate families,

and foreign government employees charged with security or administrative functions. Each of the governments requires these personnel to live at the Mission in quarters that the government provides without additional cost.

The Indian Mission is located in Manhattan, on East 43rd Street, in a building owned by the Government of India. Kamboj Affidavit, J.A. at 93. Constructed in 1993, the Indian Mission building is devoted entirely to government offices and residential apartments for the Mission's senior diplomats, their families and security personnel. Kamboj Affidavit, J.A. at 93.[1] As a matter of policy the Government of India requires its senior diplomats and security personnel to live at the Mission. Given the time difference between the Indian Mission in New York and the Ministry of External Affairs in New Delhi, the diplomats at the Indian Mission must be available day and night to respond to inquiries and communications from the Ministry and transmit reports about developments at the United Nations to the Ministry. Kamboj Affidavit, J.A. at 94-95. Housing senior diplomats at the Mission also simplifies security and encourages better participation by the diplomats and their families in social and cultural events hosted by the Mission that promote the Government of India's interests. Kamboj Affidavit, J.A. at 94-95.

The Mongolian Mission is located on East 77th Street in a building owned by Mongolia. Purejav Affidavit, J.A. at 152. The Mongolian Mission contains the offices and

[1] All the diplomats and staff residing at the Indian Mission hold G-1 or A-1 visas. Kamboj Affidavit, J.A. at 94. The United States Department of State issues G-1 visas to employees of foreign governments assigned to the United Nations, and A-1 visas to diplomats serving at a foreign sovereign's consulate. Kamboj Affidavit, J.A. at 94.

residences of the Ambassador-Permanent Representative, the Counselor, the Third Secretary, the Attaché and the administrative officer/driver. Purejav Affidavit, J.A. at 153.[2] Like the Indian government, Mongolia requires its senior diplomats and staff to live at the Mission to better fulfill their governmental and diplomatic responsibilities and to provide for their security. The time difference between the Mongolian Mission in New York and the Foreign Ministry in Ulaanbaatar is also great, requiring the diplomats at the Mongolian Mission to be available at all hours to address inquiries and communications from the Ministry and to report to the Ministry about developments at the United Nations. Purejav Affidavit, J.A. at 153.

Even though the properties in question are used exclusively to support the respective governments' diplomatic missions, the City of New York maintains that each of these buildings is subject to the City's real property tax regime. To do so, it relies on a 1958 New York state law that exempts from real property taxation only those portions of diplomatic missions to the United Nations that serve as the offices for the mission or as the residence of its "principal resident representative," *i.e.*, the ambassador or other head of the foreign government's mission. N.Y. Real Prop. Tax Law § 418(1). The Governments of India and Mongolia have declined to pay the real property taxes, however, on the ground that their entire mission premises are exempt from local real property taxation by treaty,

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[2] Since 1980, all persons who have resided in the Mongolian Mission have been employees of the Foreign Ministry or members of their families, and have held G-1 visas with the exception of the administrative officer/driver who held a G-2 visa. Purejav Affidavit, J.A. at 153.

including the Vienna Convention on Diplomatic Relations ("Vienna Convention"), *done* April 18, 1961, 23 U.S.T. 3227 and under customary international law.[3]

As of January 2003, the total amount of taxes and interest assessed by the City of New York against the Indian Mission exceeded $16 million (Amended Complaint for Foreclosure of Tax Liens, J.A. at 74-76), and the amount against the Mongolian Mission exceeded $2 million. Amended Complaint for Foreclosure of Tax Liens, J.A. at 84-87. In April 2003, the City sued each government in New York State Supreme Court to collect the taxes, to enforce statutory tax liens against their Mission properties, and for judgments of foreclosure against these properties.[4] Complaint for Foreclosure of Tax Liens (India), J.A. at 25-32; Complaint for Foreclosure of Tax Liens (Mongolia), J.A. at 40-47. India and Mongolia removed the respective actions to the United States District Court for the Southern District of New York under 28 U.S.C. § 1441(d) (J.A. at 1, 6), which provides for removal by a foreign state or its instrumentality, and the removed actions were subsequently consolidated. J.A. at 11.

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[3] Article 23 of the Vienna Convention provides in part as follows:

> "The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered." 23 U.S.T. 3227.

Article 34 extends this tax exemption to diplomatic agents who hold property on behalf of the foreign government "for the purposes of the mission."

[4] New York City's Administrative Code provides that unpaid real property taxes constitute a lien upon the property. NYC Ad. Code § 11-301. The City ultimately disavowed its foreclosure claim. March 16, 2006 Letter Brief of City of New York, Pet. App. at 83.

After discovery on the issue of jurisdiction was complete, the governments moved to dismiss the City's actions against them under the Foreign Sovereign Immunities Act of 1976, *as amended* ("FSIA"), 28 U.S.C. §§ 1602-11, which provides that, subject to existing international agreements and to the exceptions enumerated in 28 U.S.C. § 1605, "a foreign state shall be immune from the jurisdiction of the courts of the United States or of the States . . . ." 28 U.S.C. § 1604. The City relied on two alternative grounds to support jurisdiction. First, the City urged that India's and Mongolia's activities in housing their personnel within their respective missions constituted a "commercial activity carried out in the United States by the foreign state," so that a lawsuit to collect tax on such "commercial activity" was permissible under 28 U.S.C. § 1605(a)(2). Alternatively, the City claimed that its enforcement actions fell within the statutory exception to foreign sovereign immunity created by 28 U.S.C. § 1605(a)(4) for cases "in which . . . rights in immovable property situated in the United States are in issue."

The district court denied India's and Mongolia's motions to dismiss. It ruled the "rights in immovable property" exception had been satisfied, because "a tax lien directly affects a property owner's rights in the property. And a suit adjudicating the validity of such a lien therefore puts in issue the owner's rights in that property." Pet. App. at 38. The district court did not decide whether the "commercial activity" exception had also been satisfied. Pet. App. at 29 n.4.

India and Mongolia appealed the district court's order to the U.S. Court of Appeals for the Second Circuit.[5] Shortly before hearing argument, the panel invited the views of the Department of State on two issues:

> (1) whether § 1605(a)(4)'s "immovable property" exception should be "interpreted to accord" with the United Nations Convention on Jurisdictional Immunities of States and Their Property, *opened for signature* January 17, 2005, 44 I.L.M. 803, and the European Convention on State Immunity, *opened for signature* May 16, 1972, 11 I.L.M. 470, "both of which [in the panel's reading] disallow claims of immunity where proceedings relate to either: (a) a state's rights or interests in, or use of [or] possession of real property, or (b) a state's 'obligations' arising out of same[ ]"; and
>
> (2) whether "any considerations of diplomatic or foreign relations counsel a relatively narrow or expansive reading of [the FSIA's] exception for disputes in which "rights in immovable property . . . are in issue."

Letter from Clerk of Court to W. Teal of January 9, 2006, Pet. App. at 54-55.

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[5] India and Mongolia relied on the collateral order doctrine to appeal. That doctrine has been held to permit appeal to the courts of appeals in a wide variety of contexts in which the defendant claimed immunity from suit. *See Foremost McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990), *aff'd sub nom., Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (appeal of denial of foreign sovereign immunity); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) (appeal of denial of Eleventh Amendment sovereign immunity).

In its response to the Second Circuit's communication, the State Department pointed out that the United States was not a party to either of the two Conventions about which the panel had inquired, and that the U.N. Convention had not come into force in any jurisdiction. The State Department further explained that neither Convention "address[ed] and therefore [did] not purport to abrogate sovereign immunity from suits over tax liability," and that even if the Conventions had addressed tax disputes, their language would not help to interpret the FSIA, because that statute's immovable property exception "is drafted more narrowly."[6] Letter from N. Gueron to Clerk of Court of February 23, 2006, Pet. App. at 57, 60-61. The State Department also maintained that the district court's reliance on the City's statutory lien as a basis for jurisdiction was inconsistent with the FSIA's anti-attachment provisions, 28 U.S.C. §§ 1609-10, which preclude attachment of a foreign state's property as a basis for obtaining jurisdiction, and that the City's claim for back taxes was therefore nothing more than a "purely compensatory" claim, to which the FSIA's "rights in immovable property" exception did not apply. Pet. App. at 62-70. In response to the second question, the State Department advised the panel that "a finding of jurisdiction here could have

[6] The U.S. Government acknowledged that it had expressed a different view many years before, when the Department of Justice had submitted an amicus brief in support of an unsuccessful petition for en banc rehearing in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985). Letter from N. Gueron to Clerk of Court of February 23, 2006, Pet. App. at 61 n.2. Its submission explained, however, that its 1985 brief had misread the European Convention and that the drafting history of the U.N. Convention had made it clear that the still-pending Convention did not apply to tax disputes between states. *Id.*

serious implications" for this country's relationship with the United Nations, and that "bilateral relations with one of the sovereign defendants" had already been adversely affected. Pet. App. at 73-75.

The Second Circuit nevertheless affirmed the district court's denial of India's and Mongolia's motions to dismiss. Although agreeing that the City's asserted tax lien could not "create jurisdiction where none would otherwise lie" (Pet. App. at 21 n.16), the court of appeals concluded nonetheless that the sovereign governments were not entitled to immunity because their tax dispute with the City arose "directly out of their ownership of real property in the United States." Pet. App. at 21. The court of appeals acknowledged that in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985), on "facts very similar to those of this case," the U.S. Court of Appeals for the Third Circuit had found that Section 1605(a)(4) did not allow jurisdiction over a New Jersey municipality's real property tax enforcement action against property used by Libya's United Nations Ambassador. Pet. App. at 20 n.15. Nevertheless, the Second Circuit rejected the Third Circuit's conclusion, as well as the Department of State's analysis and advice, as reflected in its response to the court's request for its views.

On June 1, 2006, the Second Circuit stayed issuance of the mandate pending this Court's action on a petition for a writ of certiorari. After receiving the views of the Solicitor General, this Court granted certiorari on January 19, 2007.

SUMMARY OF ARGUMENT

Under the Foreign Sovereign Immunities Act of 1976, *as amended* ("FSIA"), 28 U.S.C. §§ 1602-11, United States courts lack jurisdiction over disputes involving a foreign sovereign unless one of the exceptions set forth in 28 U.S.C. §§ 1605-07 applies. 28 U.S.C. § 1605(a)(4) provides an exception to foreign sovereign immunity for cases in which "rights in immovable property situated in the United States are in issue." The court of appeals construed this exception from immunity to include not only cases in which "rights in" immovable property are "in issue," but also to include all disputes about "obligations arising directly out of such rights to or use of the property." Pet. App. at 17-18. Based on this expansive construction, the court of appeals held that Section 1605(a)(4) provides jurisdiction over suits against foreign sovereigns to collect real property taxes on buildings housing their diplomatic missions to the United Nations, because the suits purportedly "arise out of" India's and Mongolia's "use or possession of" the properties. The court of appeals was wrong for the following reasons:

I. The Second Circuit's construction of the statute as applying to all disputes "arising directly out of" immovable property finds no support in the statutory text. Section 1605(a)(4) permits jurisdiction only in cases in which the "issue" requires the court to determine "rights in" property, not obligations "arising directly out of" rights to or interests in property. Congress's choice of broad "arising under" language in other sections of the FSIA confirms that its choice of narrow "in issue" language in Section 1605(a)(4) was intentional. For example, in FSIA Section 1605(a)(5)(B) Congress used "arising out of" language to describe the scope of immunity for certain

intentional torts, and in Section 1607 Congress used "arising out of" language to provide an exception from immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state." 28 U.S.C. § 1607(b). In other sections of the FSIA, Congress provided exceptions from immunity when the suit is "based upon" commercial activity. 28 U.S.C. § 1605(a)(2) and (b). Where, as here, Congress chose broad "arising out of" or "based upon" language in some subsections of a statute, its choice of narrower "in issue" language in another subsection of the same statute requires that the narrower language be given a narrower construction.

II. The FSIA was intended to codify existing international practice at the time the statute was enacted. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612-13 (1992). As summarized in the Restatement (Second) of Foreign Relations Law of the United States ("Second Restatement") (1965) and confirmed by treatises and judicial decisions, that international practice limited the rights in immovable property exception to actions "contesting . . . ownership or the right to possession," and the exception did *not* apply to a lawsuit that merely "aris[es] out of a foreign state's ownership or possession of immovable property." Second Restatement § 68 and comments d and f. Section 65, comment d of the Second Restatement confirms that a territorial state may not enforce a real property tax claim against the property of a foreign state, and pre-FSIA court decisions accord with the Second Restatement. The City has conceded that no court decision prior to the FSIA had ever enforced a tax claim against a foreign government. To the contrary, the two most relevant

pre-1976 precedents concluded that customary international law prohibits such enforcement. *Republic of Argentina v. City of New York,* 25 N.Y.2d 252 (N.Y. 1969); *Reference re Tax on Foreign Legations,* [1943] 2 D.L.R. 481 (Can.).

III. The court of appeals also erred by relying on the European Convention on State Immunity, *opened for signature* May 16, 1972, 11 I.L.M. 470, and the United Nations Convention on Jurisdictional Immunities of States and Their Property, *opened for signature* January 17, 2005, 44 I.L.M. 803, to expand the scope of FSIA Section 1605(a)(4) beyond the narrow language used by Congress. Congress did *not* adopt the European Convention's language when it enacted the rights in immovable property exception. While the European Convention provides for an exception for all disputes "arising out of" immovable property, Congress chose to limit the exception in Section 1605(a)(4) to cases in which "rights in immovable property . . . are in issue." The correct inference is that Congress, having borrowed "arising out of" language from the European Convention when it enacted the counterclaim exception in Section 1607 and having rejected the same "arising out of" language from the European Convention when it enacted the rights in immovable property exception in Section 1605(a)(4), did *not* intend Section 1605(a)(4) to provide an exception for all disputes "arising out of" immovable property. Furthermore, the European Convention does not provide any basis for jurisdiction to recover real property taxes or to enforce tax liens. Rather, the European Convention's official commentary to its immovable property provision confirms that proceedings relating to "dues or taxes" are not allowed against foreign sovereigns under that exception from immunity. The

drafting history of the U.N. Convention likewise confirms that the U.N. Convention does not provide any jurisdictional basis for tax enforcement proceedings against a foreign sovereign. In contrast to these two conventions, the United States had acceded to the Vienna Convention on Diplomatic Relations ("Vienna Convention"), *done* April 18, 1961, 23 U.S.T. 3227 (entered into force with respect to the United States December 13, 1972) before the FSIA was enacted, and Congress intended the FSIA to be consistent with that treaty. The Vienna Convention precludes a receiving state from exercising civil jurisdiction to enforce a real property tax claim against diplomatic agents, their families and mission staff, and Congress could not have intended Section 1605(a)(4) to provide tax enforcement jurisdiction in the face of the Vienna Convention's protections.

IV. The FSIA's legislative history contains no basis for inferring that Congress meant to depart from international practice by creating a jurisdictional basis for real property tax enforcement proceedings. The court of appeals' reliance on a passage from House Report 94-1487, 1976 U.S.C.C.A.N. 6604 (1976), was misplaced. Nothing in the House Report shows any intent to expand the statutory immovable property exception to issues beyond those needed to determine title or possession.

The City's imposition of a tax lien on real property housing a foreign sovereign's diplomatic mission does not create a right in real property within the meaning of Section 1605(a)(4). Sections 1609 and 1610 of the FSIA forbid the use of the lien to establish jurisdiction where such jurisdiction would not otherwise lie. Moreover, unlike rights to ownership, possession and occupancy of property provided by title, easements and servitudes, mere security

interests such as liens give the holder no right to own, possess, or occupy the property. Furthermore, while disputes over ownership and possession of property are decided solely on the basis of local property law, disputes over taxation of foreign governmental property, such as that occupied by foreign sovereign diplomatic missions, are governed by treaties and customary international law and implicate United States foreign policy interests. Local courts have no special competence to decide these issues, and nothing in the language or legislative history of Section 1605(a)(4) suggests that Congress intended these sensitive issues to be resolved in local courts.

In conflict with this Court's warning in *TVA v. Hill*, 437 U.S. 153, 190 (1973), the court of appeals relied on two recent appropriations acts, Pub. L. 109-102, § 543 and Pub. L. 108-447, § 543, which require the Secretary of State to deduct from foreign aid an amount equal to 110% of real property tax judgments. Neither appropriations act illustrates Congress's 1976 intent in drafting the FSIA, and these appropriations acts can be given effect, in cases where another FSIA exception from immunity applies, without rewriting the immovable property exception.

V. The separate statutory exception for actions "based upon a commercial activity," 28 U.S.C. § 1605(a)(2), is plainly inapplicable. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) confirms that this exception does not apply to acts that only a sovereign can perform, and the operation and staffing of a foreign mission and the deployment of its senior diplomatic personnel is peculiarly sovereign.

ARGUMENT

I. A Lawsuit to Collect Local Property Taxes Does Not Fall Within the Literal Terms of the Foreign Sovereign Immunity Act's Exception for a "Case ... in which ... Rights in Immovable Property ... Are in Issue."

As foreign sovereigns, the Governments of India and Mongolia are "presumptively immune from the jurisdiction of United States courts," as are their agencies and instrumentalities such as their Missions to the United Nations. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *see also* 28 U.S.C. § 1604. The sole basis for obtaining jurisdiction over them must be found, if at all, in the Foreign Sovereign Immunities Act of 1976, *as amended*, 28 U.S.C. §§ 1330, 1602-11 (the "FSIA"); *Saudi Arabia v. Nelson*, 507 U.S. at 355. The FSIA is "a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria v. Altmann,* 541 U.S. 677, 691 (2004) (quoting *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488 (1983)). Unless a specified exception to sovereign immunity found in the FSIA applies, the foreign sovereigns remain immune from suit in U.S. courts. *Republic of Austria v. Altmann,* 541 U.S. at 691; *see also Saudi Arabia v. Nelson*, 507 U.S. at 355. The FSIA's "immovable property" exception, 28 U.S.C. § 1605(a)(4), provides for jurisdiction in U.S. courts over claims against a foreign sovereign in which "rights in immovable property situated in the United States are in issue." The City's tax claim does not fit with the express statutory text, which excepts from sovereign immunity only a "case" in which "rights in" immovable property are "in issue." The "case" presented by

the City – that India and Mongolia owe taxes and should pay them – does not place "in issue" India's and Mongolia's "rights in immovable property." The City does not challenge or dispute India's or Mongolia's rights of ownership, use, control, possession or occupancy of the "immovable property" at issue in this case, nor does it assert that any other person has a right to disturb or encroach upon those rights in the property, such as by way of an easement.[7] India's and Mongolia's "rights in" their immovable property are simply not "in issue."

The U.S. Court of Appeals for the Second Circuit nonetheless found jurisdiction in these cases by construing the language of Section 1604(a)(4) to encompass not only cases in which "rights in" immovable property are "in issue," but also any dispute concerning any "obligations arising directly out of such rights to or use of the property," including "obligations . . . imposed by the local government as part of its property law regime." Pet. App. at 17-18 and n.13. This expansion of the statutory language to eliminate foreign sovereign immunity for all cases involving "obligations arising directly out of" any "rights to" or "use of" immovable property is inconsistent with Congress's choice of much more limited statutory language and with the pre-existing international practice that Congress intended to codify.

Congress chose language limiting the exception to "rights," not "obligations," and specifically to rights "in" property, and not, more broadly, to obligations "arising directly out of" rights to or use of property. When Congress

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[7] We discuss at Part IV.B. below the City's claim, rejected by the court of appeals, that its assertion of a tax "lien" involves such a "right."

intended in the FSIA to make the scope of immunity turn upon whether a plaintiff's claim "arises out of" identifiable acts or relationships, it knew how to do so. In the very next subsection, the FSIA addresses the scope of immunity for "any claim *arising out of* malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 1605(a)(5)(B) (emphasis added).[8] Similarly, subsection 1605(a)(2) creates a distinct statutory exception for claims "based upon" a commercial activity. 28 U.S.C. § 1605(a)(2).

In *Saudi Arabia v. Nelson*, 507 U.S. at 357-58, this Court, interpreting the "commercial activity" exception, found significance in the distinction Congress had drawn between a suit "based upon" commercial activity and one "'based upon' acts performed 'in connection with' such activity." The distinction drawn between actions in which rights in real property are "in issue," and those that "arise from" rights to or use of real property, is equally significant. The obligation of India and Mongolia to pay tax may be "in issue," but that obligation is not a "right in" real property, any more than would a dispute over the Mission's obligation to pay a

[8] This exception from jurisdiction in the FSIA is based on 28 U.S.C. § 2680(h), the Federal Tort Claims Act's exemption from liability for "intentional tort." H.R. Rep. No. 94-1487, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620. The FTCA's "arising" language has been broadly read to preserve the sovereign immunity of the United States from suits for injury "associated in any way" with intentional tort. *Sheridan v. United States*, 487 U.S. 392, 409 (1988) (O'Connor, J. dissenting) (discussing *Kosak v. United States*, 465 U.S. 848 (1984)). Nothing in the text or legislative history of Section 1605(a)(4) remotely suggests that Congress intended to create an exception to immunity for any claims "associated in any way" with immovable property.

merchant for selling it a rug or to compensate a visitor who later slips on the rug.[9]

II. Pre-Existing International Practice Supports a Construction of the Immovable Property Exception that Preserves Immunity From Tax Enforcement Lawsuits.

Congress intended the "immovable property" exception to codify existing international practice at the time the FSIA was enacted in 1976. *Asociacion de Reclamantes v. United Mexican States,* 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.), *cert. denied,* 470 U.S. 1051 (1985); *see generally Republic of Argentina v. Weltover, Inc.*, 504 U.S. at 612-13. To strip a sovereign state of immunity for any claim that "arises out of" its ownership of real property would not have codified pre-existing international practice, as it was understood in 1976. As the City has already conceded, "prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax dispute." Brief in Opposition to Petition for Certiorari at 15. The City's concession is more than appropriate given that, prior to the enactment of the FSIA in 1976, foreign sovereigns were immune from suit in cases "arising out of a foreign state's ownership or possession of immovable property", with a limited exception for cases in which a foreign state was sued to resolve "questions pertaining to title or the adverse interest of individual claimants." 2 Charles C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945); *accord*

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[9] These latter disputes may well be covered by the separate exemptions for actions based upon a "commercial activity" or caused by a "tortious act." 28 U.S.C. §§ 1605(a)(2) and (5).

Sovereign Immunity, 6 Whiteman *Digest* § 20, at 638 (1968) (*quoting* Restatement (Second) of Foreign Relations Law ("Second Restatement") § 68 cmt. d (1965)); *Reclamantes*, 735 F.2d at 1522 (pre-existing real property exception was "limited to disputes directly implicating property interests or rights to possession").

Section 65 of the Second Restatement states the general rule that a sovereign is "immune from the exercise of another state of jurisdiction to enforce rules of law."[10] Comment d to this general rule distinguishes between "prescriptive jurisdiction," which is not necessarily foreclosed by this general immunity rule, and "enforcement jurisdiction," which is foreclosed, subject only to the exceptions specified in Sections 68 and 69, which reflect, *inter alia*, the "restrictive theory" of sovereign immunity under which immunity applies only to "sovereign acts," not to "private" acts. *See* Second Restatement § 65 cmt. d; *see also id.* at § 69, reporters' note 1 (citing and embracing shift in United States policy as reflected in 1952 letter by State Department Acting Legal Advisor Jack B. Tate).[11] Remarkably, comment d to Section 65 of the Second Restatement uses as an example the inclusion of foreign governmental property on the territorial state's tax rolls,

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[10] The district court erred in relying on the Restatement (Third) of Foreign Relations Law § 455, comment b (1987). Pet. App. at 39-40. The Third Restatement, published more than a decade after the FSIA, does not purport to reflect international understanding prior to 1976. The sole authority it cites for the proposition that tax disputes are "subject to adjudication in local courts" is the text of the FSIA itself.

[11] In its brief responding to this Court's invitation, the United States has explained that the "real-property exception" predates, and is wholly independent of, the restrictive theory of immunity. Brief of United States as Amicus Curiae at 7-9.

which is merely "prescriptive", and the actual enforcement of "tax claims against the property of a foreign state," which is "enforcement" and, thus, prohibited.[12]

Section 68(b) of the Second Restatement recognizes only a narrow exception to the general "enforcement" immunity rule for an "action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction." Comment d to Section 68 of the Second Restatement makes clear that this exception applies only to actions "contesting . . . ownership or the right to possession," and that the exception does not apply to a lawsuit that merely "aris[es] out of a foreign state's ownership or possession of immovable property. . . . " Comment f to Section 68 reiterates that the immunity exception recognized by the section "deals solely with the immunity of a foreign state from claims of *adverse ownership interests* in [non-diplomatic] property. . . ." (emphasis added). *See also* Sovereign Immunity, 6 Whiteman *Digest* § 20, at 638 (1968) (referencing Restatement); *Documents of the Thirty-Fifth Session*, [1983] 2 Y.B. Int'l L. Comm'n 48, U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part I) ("judicial practice . . . seems to bear out the absence of immunity for proceedings involving determination of ownership of property and its acquisition of title under the internal law of the State of the *situs* by the territorial court").

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[12] A subsequent section of the Restatement makes clear that "diplomatic premises owned by the sending state" are "exempt" from both "prescription" and "enforcement of any tax or levy of the receiving state except one that represents payment for specific services rendered." Second Restatement § 77(4).

The Second Restatement accurately summarizes international practice prior to the FSIA. Indeed, only seven years before the FSIA was enacted, the City, recognizing the Second Restatement's accuracy, conceded that New York's courts lacked the power to enforce its real property tax claim against the Republic of Argentina.[13] In *Republic of Argentina v. City of New York,* 25 N.Y.2d 252 (N.Y. 1969), New York's highest court agreed with the City's concession, further holding that "principles of customary international law" entitled Argentina, the plaintiff, to a judgment declaring its consular property exempt and discharging the City's liens on that property.[14] Fundamental to the New York Court of Appeals' decision was its premise, with which the City agreed, that international law did not allow the city to "compel the payment of a tax by proceeding directly" against Argentina's property. *Id.* at 262. In light of the lack of any authority to enforce its tax claim in a judicial proceeding, the New York Court of Appeals concluded that the City's levy and assessment of a tax against

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[13] Brief of Respondent in Answer to Brief Amicus Curiae of United States at 9, *Republic of Argentina v. City of New York,* 25 N.Y.2d 252 (N.Y. 1969).

[14] The case was decided shortly before the United States acceded to the Vienna Convention on Consular Relations ("Vienna Convention"), *opened for signature* April 18, 1961, 21 U.S.T. 3227, Article 32 of which establishes, as a matter of treaty, that consular premises are immune from local real property taxes. The City therefore based its claim on the lack of an established exemption for "consular" as distinct from an exemption for diplomatic property. The New York Court of Appeals, however, recognized what Professor William W. Bishop had earlier described as "a growing tendency to recognize the immunity from taxation of both personal and real property owned by the sending state and used for the clearly public purpose of providing a consular office or residence for the consular officer." William W. Bishop, "Immunity from Taxation of Foreign State-Owned Property," 46 Am. J. Int'l Law 239, 247 (1952).

Argentina would be "a futile gesture, serving only to embarrass a friendly State without concomitant benefit to the city." *Id.* at 261.[15] Furthermore, the New York Court of Appeals reasoned that international law precluded the City from affecting the property "indirectly" by imposing a lien, which would reduce the resale value of the property. *Id.* at 262.

The New York court's ruling is consistent with the Second Restatement (which it cites at 25 N.Y.2d at 263), with scholarly writings,[16] and with the most pertinent previous judicial precedent, the Supreme Court of Canada's ruling in *Reference re Tax on Foreign Legations,* [1943] 2 D.L.R. 481 (Can.). In that decision, after a lengthy review of English and European precedents, which found "no known case in which a demand has been made to compel a diplomatic agent to pay a tax imposed by the territorial government" (*id.* at 498), the Canadian court concluded that payment of a tax "cannot be demanded by one equal sovereignty from another, or from its diplomatic agent; and there is a general acceptance of the view that

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[15] The City argued that Argentina's consulate was not entitled to the immunity accorded to "diplomatic" property. It did not argue that it was entitled to enforce its lien even against the consular property, but only that it was entitled to maintain an "inchoate" lien. Brief of Respondent at 14, *Republic of Argentina v. City of New York*, 25 N.Y.2d 252; Brief of Respondent in Answer to Brief Amicus Curiae of United States at 9, *Republic of Argentina v. City of New York*, 25 N.Y.2d 252.

[16] *See, e.g.*, John W. Foster, *The Practice of Diplomacy* 171 (1906) ("[T]he property of the mission, and the real estate occupied by the legation residence and office, if owned by the foreign government, are exempt from taxation"); Eleanor W. Allen, *The Position of Foreign States Before National Courts* 17 (1932) ("The doctrine of the subjection of real property to the jurisdiction of the local courts . . . does not supersede that of the inviolability of legation property. . . . ").

such tribute is not exigible, consistently with the principles of the law of nations." *Id.* at 492.

The Second Circuit misread these consistent expressions of international practice prior to the FSIA. It ignored Section 65 of the Second Restatement, which unambiguously prohibits actual enforcement of a tax claim against the property of a foreign state, and it misread the New York Court of Appeals' opinion in *Republic of Argentina* as recognizing that "courts had jurisdiction to hear disputes such as this one." Pet. App. at 17 n.12. Argentina was the *plaintiff* in that case; it had sued the City to *remove* the lien. The City had not sued Argentina to *enforce* its lien; it had conceded that no court could hear such a suit. The New York courts, therefore, had jurisdiction to hear Argentina's claim because Argentina had waived its immunity to suit by "initiating legal proceedings." Second Restatement § 70 and comment b (*citing National City Bank v. Republic of China,* 348 U.S. 356 (1948)).[17] Moreover, as discussed above, although the New York Court of Appeals' ultimate conclusion – that Argentina's consular property was exempt from the City's tax – reached the "merits" of the tax dispute, a fundamental underpinning of the court's conclusion was that the courts lacked jurisdiction to enforce the City's tax claim.

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[17] *United States v. City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y. 1971), which the Second Circuit cited to the same effect, is equally off the mark. The only sovereign party in that case was the United States, which successfully sued to enjoin that municipality from taxing property that housed the Permanent Representative of the Soviet Union "and his deputies." Not only was the Soviet Union not a defendant; it did not even deign to be a plaintiff.

III. The European Convention on State Immunity and the U.N. Convention on Jurisdictional Immunities Both Retain a Foreign Government's Immunity From Local Tax Enforcement Lawsuits.

Accepting that the FSIA was intended, in part, to reflect international practice, the Second Circuit sought confirmation for its expansive reading of Section 1605(a)(4) in two international conventions, neither of which has been signed or ratified by the U.S. government, as evidence of that international practice. Pet. App. at 13-16.[18] The first of these conventions, the European Convention on State Immunity ("European Convention"), *opened for signature* May 16, 1972, 11 I.L.M. 470, entered into force in 1976 when it was signed or ratified by three members of the Council of Europe and has subsequently been ratified by a handful of other members of the Council of Europe.[19] The other convention is the United Nations Convention on Jurisdictional Immunities of States and Their Properties ("U.N. Convention"), *opened for signature* January 17,

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[18] The issue presented in this case turns on the construction of a U.S. statute, in light of Congressional intent, rather than a court use of "the law of nations" to affect private rights. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004). To the extent Congress intended the FSIA to reflect international practice, it would not be inappropriate to consult contemporaneous treaties as an example of international practice, even if the United States had not acceded to these treaties. This Court has recognized that in cases where international practice is relevant a court may consult treaties as evidence of "the usages of civilized nations," even in the absence of U.S. accession. *Sosa v. Alvarez-Machain*, 542 U.S. at 734 (*citing The Paquete Habana*, 175 U.S. 677, 700 (1900) (a prize case)).

[19] *See* Council of Europe Treaty Office, Status of European Convention on State Immunity, at http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=7&DF=12/26/2006&CL=ENG.

2005, 44 I.L.M. 803, which was approved by the United Nations General Assembly only in December 2004, and does not appear to be in force anywhere.[20] Article 9 of the European Convention denies immunity for "obligations arising out of [the state's] rights or interests in, or use or possession of, immovable property." 11 I.L.M. at 473. Similar language appears in Article 13 of the U.N. Convention. 44 I.L.M. at 808.

Although the wording of each Convention is quite unlike that of Section 1605(a)(4), and even though the U.N. Convention postdates the FSIA by almost 30 years, the Second Circuit interpreted each of these conventions as supporting its construction of the FSIA under which the jurisdiction of U.S. courts would extend to suits "arising out of the foreign state's obligations stemming from its ownership of property." Pet. App. at 13. In fact, neither convention supports the Second Circuit's interpretation of Section 1605(a)(4).

In the first place, neither convention provides any basis for jurisdiction over real property tax claims. Article 29 of the European Convention explicitly *excludes* proceedings covering "customs duties, taxes or penalties" from its coverage. 11 I.L.M. at 481. Indeed, the Council of Europe's Explanatory Report states: "Article 9 covers . . . proceedings relating to the payments due from a State for the use of immovable property . . . *with the exception of dues or taxes* (*see* Article 29, sub-paragraph (c))." Council of Europe, European Convention on State Immunity: Explanatory

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[20] Under Article 30 the U.N. Convention was to come into force upon the ratification by 30 members. Under Article 28 the Convention remained open for signature until January 17, 2007. As of that date it appears the treaty has not entered force.

Report ¶ 44, *at* http://conventions.coe.int/Treaty/en/Reports/Html/074.htm (last visited February 21, 2007) (emphasis added). The U.N. Convention likewise does not allow suits to recover taxes or to impose tax liens on foreign state-owned property. Early drafts of the U.N. Convention included *both* an immovable property exception (mirroring the provision ultimately adopted as Article 13) and also a separate provision waiving immunity for suits to collect taxes on real property used for *commercial* purposes. *See* Special Rapporteur's Sixth Report on Jurisdictional Immunities of States and Their Property, U.N. Doc. A/CH.4/376, January 31, 1984, at 21-25, *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_376.pdf. Had the U.N. Convention's "immovable property exception" been understood to allow tax enforcement suits, the separate provision would have been unnecessary. *See, e.g.*, *Foster v. Neilson*, 27 U.S. 253, 311 (1829) (every clause of treaty should be given meaning). Furthermore, the tax exception of the U.N. Convention was ultimately deleted, as inappropriate to a document that was intended to address only disputes between states and private persons, rather than state-to-state relations. *See Summary Records of Meetings of the 2220th Meeting*, [1991] 1 Y.B. Int'l L. Comm'n 84, U.N. Doc. A/CN/4/SER.A/1991.

Second, the language of both conventions differs in very material respects from that of Section 1605(a)(4). Article 9 of the European Convention abrogates immunity for suits involving not only a foreign state's "rights or interests in, or its use or possession of, immovable property," but also its "obligations arising out of its rights or interests in, or use or possession of, immovable property." 11 I.L.M. at 473. Article 13 of the U.N. Convention similarly provides an exception to immunity in cases involving

not only "any right or interest of the State in, or possession of," immovable property, but also "any obligation of the State arising out of its interest in, or its possession or use of, immovable property." 44 I.L.M. at 808. As previously discussed, and as the Second Restatement reflects, prior to the FSIA, suits "arising out of" real property "obligations" were generally barred by sovereign immunity both in the United States and elsewhere. Thus, the legal regime sought to be established by the two conventions, at minimum, represented a sharp break with prior international law.

Third, although the U.N. Convention postdates the FSIA by almost 30 years, and was therefore not available to Congress in 1976, Congress was at least aware of the European Convention, upon which the Second Circuit so heavily relied, and the FSIA's legislative history confirms that Congress's failure to adopt the language of the European Convention's immovable property exception was intentional. The European Convention's text was included in the hearing record, and the State Department's Acting Legal Advisor, Monroe Leigh, directly testified about it.[21]

When Congress drew on the European Convention's language, it acknowledged the source of its borrowing. For example, both the FSIA and the European Convention contain a "counterclaim exception" providing that when a foreign state commences an action in a domestic court, it loses sovereign immunity for counterclaims "arising out of" the subject matter of the foreign state's claims. *Compare* 28

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[21] Jurisdiction of U.S. Courts in Suits Against United States: Hearings on H.R. 11315 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 94th Cong. 37-50 (1976).

U.S.C. § 1607(b) (exception to sovereign immunity for counterclaims "arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state"), *with* European Convention, art. 1(2)(a) (exception to sovereign immunity for counterclaims "arising out of the legal relationship or the facts on which the principal claim is based"). 11 I.L.M. at 470. The House Report explains the similarity of the language in FSIA's counterclaim exception and the European Convention's counterclaim exception on the basis that FSIA Section 1607(b) is "based upon article 1 of the European Convention." H.R. Rep. No. 94-1487 at 23, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6622 (1976). The House Report on Section 1605(a)(4) contains no reference to the European Convention. *See* H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6618-19. That Congress used the European Convention's broad "arising out of" language in the counterclaim exception of the FSIA, but chose narrower "in issue" language in the immovable property exception, provides further evidence that Congress did not consider the different literal terms to convey the same meaning. *See, e.g., United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely").

Finally, if there is any international agreement that illustrates pre-1976 international practice regarding tax enforcement proceedings, it was a treaty to which the United States had acceded, the Vienna Convention on Diplomatic Relations ("Vienna Convention"), *done* April 18, 1961, 23 U.S.T. 3227 (entered into force with respect to the United States December 13, 1972), and not treaties to which the United States has never acceded and in which,

in one case, has never gone into effect anywhere. The House Report on the FSIA specifically refers to the Vienna Convention in its discussion of the immovable property exception to immunity in Section 1605(a)(4) and reflects Congress's understanding that the FSIA was consistent with the Vienna Convention. H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6619. Consistent with the Vienna Convention, Congress could not have opened U.S. courts to real property tax enforcement actions against foreign governments or their diplomatic personnel. Articles 34 and 37 of that Convention *exempt* a foreign mission's diplomatic agents, staff and their families from liability for any taxes on "immovable property" that is held "on behalf of the sending State for the purposes of the mission." 23 U.S.T at 3242, 3244. Articles 31 and 37 preserve their immunity from the receiving State's civil jurisdiction to enforce *any* claim relating to real estate that they hold "for the purposes of the mission." 23 U.S.T. at 3240, 3244. Furthermore, although Article 31 excludes from immunity any "*real action* relating to private [non-mission] immovable property" in the receiving state's territory (23 U.S.T. at 3240), the term "a real action" excludes "actions for recovery of rent or performance of other obligations *deriving from ownership or possession of immovable property*." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 238 (2d ed. 1998) (emphasis added). *Accord, Logan v. Dupuis*, 990 F. Supp. 26, 29 (D.D.C. 1997) (citing 1976 edition of Denza treatise). In sum, to interpret Section 1605(a)(4) as creating jurisdiction over the City's tax enforcement claim would be inconsistent with the Vienna Convention, to which the United States had acceded, as well as with prior international understandings.

IV. The Legislative History of FSIA Does Not Support a Reading of the Immovable Property Exception At Odds with Its Literal Terms and Pre-existing International Understanding.

A. The Legislative History Fails to Demonstrate Any Congressional Intent to Expand the Real Property Exception beyond Issues of Title and Possession.

The Second Circuit erred also when it read the Report of the House Judiciary Committee on H.R. 11315, the bill that was ultimately adopted by Congress, as confirming its "arising under" interpretation.[22] The court cited two passages from the House Report, H.R. Rep. No. 94-1487. The first of these says Section 1605(a)(4) "denies sovereign immunity in litigation relating to rights in real estate," Pet. App. at 10 (quoting H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6618). The second merely says that the Vienna Convention seems to permit the host state "the right to adjudicate questions of ownership, rent, servitudes, and similar matters," even where foreign mission property is involved. Pet. App. at 11 (quoting H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6619). Without any further explanation the Second Circuit read these passages to "make clear that *any* actions that do not disturb a foreign state's possession of the premises are permitted,

[22] Through a mix-up, both Houses attempted to adopt both H.R. 11315 and the identical Senate bill, S.3533, but as there remained some doubt as to whether the Senate bill was properly enrolled, the President signed only the House version and vetoed the Senate version. 12 Weekly Comp. Pres. Doc. 1554 (Oct. 22, 1976). The House Report is therefore regarded as authoritative, although the Senate Report is identical.

up to and including suits involving questions of ownership." Pet. App. at 11 n.7 (emphasis added).

The House Report does not bear the Second Circuit's expansive interpretation. In the first place, the cited passage from the House Report refers specifically to Article 22 of the Vienna Convention, which provides in pertinent part: "The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution." 23 U.S.T. at 3238. To the extent that the House Report expresses the view that the proposed FSIA was consistent with the Vienna Convention, this passage must be understood in light of the very next Article of the Vienna Convention, Article 23, which provides: "The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered."[23] 23 U.S.T. at 3238.

The House Report should also be read in light of the analysis of the "immovable property" exception that the Administration had provided in connection with the draft legislation presented by Secretary of State Rogers and Attorney General Kleindienst, which was ultimately

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[23] As discussed above, although the Vienna Convention does contain an exception to immunity for "real actions" (Vienna Convention, art. 23, 23 U.S.T. at 3238), it excludes from that exception those lawsuits that are based upon the "performance of ... obligations deriving from ownership or possession of immovable property." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 238 (2d ed. 1998).

enacted without change as Section 1605(a)(4) of the FSIA. *See* Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. at 41-42 (1973) (Attachment to Statement of Charles M. Brower, Acting Legal Advisor, State Department). The House Report adopts this analysis almost verbatim. *See* H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6618-19. In his written statement to the House Subcommittee with respect to the proposed legislation, Acting Legal Advisor Brower described the draft exception as "in keeping with the law at the present time." Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. at 21 (1973). The State Department's understanding of "the law at the present time" was that expressed in the U.S. Government's brief as *amicus curiae* to the New York Court of Appeals in *Republic of Argentina*, 25 N.Y.2d 262: A host government "may not compel the payment of a tax" by a judicial proceeding against a foreign government's property.[24]

The most that can be reasonably gleaned from the House Report is that *some* disputes about rent and other matters may be subject to jurisdiction where resolution of the dispute requires a determination of who lawfully owns or is entitled to possession of the rental property. That is the conclusion Judge Scalia drew in *Reclamantes*:

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[24] Bruno Ristau, the Government's counsel in the *Argentina* case, sat next to Mr. Brower, and testified himself before the Subcommittee. *See* Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. at 28 (1976).

"Reference to such actions [for rent] in the legislative history of the FSIA . . . does not establish any departure from the traditional principle that the real estate exception to sovereign immunity is bounded by concern for those issues [of title and possession]." 735 F.2d at 1523 n.5. The First Circuit drew the same conclusion in *Fagot-Rodriguez v. Republic of Costa Rica,* 297 F.3d 1, 12-13 (1st Cir. 2002). Relying in part on the review of the FSIA's legislative history in *Reclamantes*, the First Circuit concluded that Section 1605(a)(4) does not provide a basis for jurisdiction for an action to recover rent on a property long since vacated by its diplomatic tenant.[25]

In contrast, the City's tax claim "relat[es] to rights in real estate" only in the same very general sense as a slip and fall claim: each seeks money from the property owner for its alleged failure to perform an obligation generally applicable to property owners, *i.e.*, the duty to keep the premises reasonably safe for visitors. However, as even the Second Circuit conceded, the "immovable property" exception from immunity does not subject a foreign mission to a "garden-variety tort claim." Pet. App. at 19 n.14.

Another subsection of the FSIA, 28 U.S.C. § 1605(a), excepts from immunity claims caused by a "tortious act or omission," but carves out from this exception from immunity claims based, among other things, on the failure of

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[25] The First Circuit also observed that many suits for rent are likely to fall under the distinct exception for lawsuits "based upon a commercial activity," *i.e.*, the rental contract between the mission and the property-owner, but it held jurisdiction lacking over the plaintiffs' claim against Costa Rica in the absence of any allegation that Costa Rica had ever entered into any lease with the plaintiffs. *Fagot-Rodriguez v. Republic of Costa Rica,* 297 F.3d at 6.

the foreign government to perform a discretionary function. In *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987), for example, the D.C. Circuit concluded that a foreign chancery's unsightly renovation was a discretionary act and that therefore the "tortious act" exception from immunity did not apply.[26] To apply the "immovable property" exception to provide jurisdiction over such claims would allow litigants to circumvent the limits Congress placed on the "tortious act" exception from immunity.

B. The City's Statutory Tax Lien Is Not "Similar" to "Questions of Ownership, Rent, [and] Servitudes."

The Second Circuit gave little if any added weight to the City's claim that its statutory tax lien itself amounted to a "right in real property." Pet. App. at 21 n.16. The House Report's reference to "questions of ownership, rent, servitudes and similar matters" cannot support jurisdiction over the City's tax enforcement claim because the City's lien is neither a "right in real property," nor is it "similar" to a "question of ownership, rent, [or] servitudes." H.R. Rep. No. 94-1487 at 20, 1976 U.S.C.C.A.N. at 6619. As this Court held in *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999), liens "are merely a means to the end of satisfying a claim for the recovery of money."

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[26] To be sure, the Peruvian chancery's "tort" had terminated at the time suit was filed (809 F.2d at 919), but there is nothing in the text of § 1605(b)(4) that limits the exemption to claims relating to current, as opposed to past, occupancy of real estate.

The City's lien is likewise merely a device through which the City seeks to enforce its tax claim. Indeed, United States law has generally distinguished between "rights in" real property and mere "security interests" in real property. The lien is not a "right in immovable property" as that phrase has traditionally been understood by United States courts. Rather, a lien is a mere "charge on [the] property," which "confers no general right of property." *Marine Midland Bank v. Marcal Enters., Inc.*, 398 N.Y.S.2d 782, 783 (N.Y. Co. Ct. 1977), *aff'd per curiam*, 407 N.Y.S.2d 833 (N.Y. App. Div. 1978); *see also* Restatement (First) of Property § 540, cmt. a (1944) (a lien is "merely additional security"); *Bertie's Apple Valley Farms v. United States*, 476 F.2d 291, 292 (9th Cir. 1973) (*per curiam*) (distinguishing between "title interest" in property as to which U.S. has not waived sovereign immunity and "lien interest"). Thus the New York courts have long held that a tax lien does not create "an estate or interest in the real property" sufficient to give the lienor standing to participate in an eminent domain proceeding. *Weinstein v. Taylor*, 234 N.Y.S.2d 926, 929 (N.Y. Sup. Ct. 1962), *aff'd mem.*, 242 N.Y.S.2d 707 (N.Y. App. Div. 1963). This body of established U.S. domestic law at the time the FSIA was enacted further reinforces Congress's intent to make a distinction between "rights in" real property and mere security interests (such as liens) when it enacted § 1605(a)(4).

The City's tax lien claim is unlike a claim to a "servitude" in another important respect. Easements and servitudes, like other questions of ownership, possession, and occupancy of property, turn upon local property law and are therefore appropriate for resolution in local courts. In contrast, resolution of the City's claim to a tax lien

would necessarily turn upon the taxability of foreign-government property, especially that occupied by diplomatic missions, a question that is not governed solely by local law, but rather by treaties such as the Vienna Convention on Diplomatic Relations. Nothing in the language or legislative history of Section 1605(a)(4) suggests that Congress intended these matters of U.S. treaty obligation, with their potential effect on international relations, to be resolved by a local court.

Furthermore, to rely on the statutory lien as itself sufficient to create a "property interest" in India's and Mongolia's diplomatic properties would in effect use the "device of the lien to create jurisdiction where none would otherwise lie." Pet. App. at 21 n.16. Such bootstrapping is contrary to 28 U.S.C. §§ 1609 and 1610, which forbid the use of pre-judgment attachment to establish jurisdiction, where jurisdiction would not otherwise lie. *See* H.R. Rep. 94-1487 at 26-27, 1976 U.S.C.C.A.N. at 6625-26. The sole exception to the anti-attachment principle is contained in 28 U.S.C. § 1605(b), which provides a basis for admiralty jurisdiction to enforce a maritime lien, but only when that lien is "based upon a commercial activity." To recognize the device of a statutory lien as a basis for jurisdiction over a suit based upon a foreign state's "public" non-commercial activity would erase the very distinction between public and commercial acts that lies at the heart of the FSIA. Furthermore, as the United States has already pointed out in its brief as *amicus curiae* in support of certiorari, New York law creates a multitude of statutory liens "related to real property." *See* Brief of the United States as Amicus Curiae at 16 n.9. Reliance on such liens to create jurisdiction would abrogate immunity over a wide variety of "garden variety" disputes merely because of the vagary of

state procedures for enforcing a claimant's rights against defendants generally.

C. The 2004 and 2005 Foreign Operations Appropriations Acts Do Not Illuminate the FSIA.

The Second Circuit also mistakenly relied on two appropriations laws that were enacted in 2004 and 2005, almost 30 years after the FSIA was written, to support its proposition that in 1976 Congress intended the "immovable property" exception to the FSIA to grant jurisdiction to U.S. courts to enforce a tax lien against a foreign government's property used exclusively to support its diplomatic mission. Pet. App. at 5-6. These appropriation laws require that 110% of any property taxes unpaid in the District of Columbia or New York City that have been determined to be owing "in a court order or judgment" be withheld from that country's foreign aid. Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, Pub. L. 109-102, § 543, 119 Stat. 2172, 2214-15 (2005); Consolidated Appropriations Act of 2005, Pub. L. 108-447, § 543, 118 Stat. 2809, 3011-12 (2004).[27]

The Second Circuit's reliance on the two appropriation laws disregards this Court's repeated warning against using the "views of a subsequent Congress" to "infer[] the intent of an earlier one." *United States v. Price,* 361 U.S. 304, 313 (1960). This warning carries special force where

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[27] The language was first inserted into the Senate version of the 2005 appropriation act, without any explanation, by an amendment sponsored by Sen. Schumer (D-NY), and adopted by voice vote without debate. 150 Cong. Rec. S 9560-61 (daily ed. Sept. 23, 2004).

appropriations acts are concerned. *See TVA v. Hill,* 437 U.S. 153, 190 (1973); *Metro Broad., Inc. v. FCC,* 497 U.S. 547, 629 (1990) (O'Connor, J., joined by Rehnquist, C.J., Scalia and Kennedy, JJ., dissenting). The effect of later appropriations on extant substantive legislation must be "construed narrowly." *Donovan v. Carolina Stalite Co.,* 734 F.2d. 1547, 1558 (D.C. Cir. 1984) (Bork, J.) (*citing United States v. Langston,* 118 U.S. 389 (1886)). There is no reason to read these appropriations acts, as the Second Circuit appears to have read them, as a congressional endorsement of New York City's construction of the "immovable real property" exception, because these appropriations acts can still be given effect without reading Section 1605(a)(4) to provide jurisdiction over real property tax enforcement proceedings. For example, foreign governments retain the right to waive their sovereign immunity, take the offensive, and file suit challenging the validity of the tax as it applies to them. That is the course that Argentina successfully took 40 years ago, when it commenced an action to recover past taxes that it had improvidently paid and to declare that it had no obligation to pay taxes in the future. *Republic of Argentina v. City of New York*, 25 N.Y.2d at 257. If a foreign government followed that same course today, 28 U.S.C. § 1607 would provide a basis for jurisdiction over the City's counterclaim for back taxes, and if the City obtained a judgment the appropriation law would require a foreign aid set-off. [28]

[28] For example, the Kingdom of Denmark recently sued the City of Los Angeles to recover transfer taxes it had paid with respect to its consul's official residence in that city. The City counterclaimed, and the Superior Court entered judgment against the City. *See* docket of *Foreign Ministry of the Kingdom of Denmark v. City of Los Angeles,* SC 079161 (Cal. Super. Ct., L.A. Co.) *at* http://www.lasuperiorcourt.org/

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The FSIA's exception for actions "based on a commercial activity" provides an independent basis for jurisdiction to enforce a tax where some or all of the property has been leased to domestic tenants or used for commercial purposes such as a retail store. 28 U.S.C. § 1605(a)(2). As such, Congress's requirement to deduct some nations' unpaid property tax obligations from U.S. foreign aid by no means requires or even suggests that the FSIA's "immovable property" exception must encompass jurisdiction for actions to enforce a tax assessment against these governments. The Second Circuit's attempt to rewrite the statutory text and history with appropriation riders adopted 30 years later is unsupportable and should not be permitted.

V. The City's Alternative Basis for Jurisdiction – That Requiring Their Diplomats to Reside at Their Missions Constitutes "Commercial Activity" – is Plainly Inapplicable and Should Be Rejected.

Neither the district court nor the Second Circuit relied on the City's alternative argument – that the decision of India and Mongolia to require their diplomatic staff to live at their respective missions fell within the "commercial activity" exception for the FSIA. 28 U.S.C. § 1605(a)(2). There is no factual dispute about the nature of the activity in which the diplomats of India and Mongolia are involved when they reside at the missions: they engage in governmental functions. India and Mongolia require their diplomats to live at the missions as a matter of governmental policy to assure real-time responsiveness to the foreign

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civilCaseSummary/index.asp?CaseType=Civil (last visited February 21, 2007).

ministries, to promote diplomatic security, and to advance the cultural and political functioning of the missions. The City's characterization of these governments' activity as "commercial" is baseless. The "commercial activity" exception applies when the foreign government "exercises 'only those powers that can also be exercised by private citizens,'" by entering into a market-based relationship with private actors. *Saudi Arabia v. Nelson*, 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. at 614). The exception does not apply to acts that only a sovereign can perform. *Saudi Arabia v. Nelson*, 507 U.S. at 362. It certainly does not apply to a sovereign's relationship with its own diplomatic personnel.

Like the police actions at issue in *Saudi Arabia v. Nelson* the operation of a diplomatic mission is "peculiarly sovereign in nature." 507 U.S. at 361. The House Report on the FSIA specifically recognized that, the employment relationship between a foreign state and its diplomats is "public or governmental and not commercial in nature." H.R. Rep. No. 94-1487 at 16, 1976 U.S.C.C.A.N. at 6615. That private employers may have business reasons for providing rent-free housing to their employees cannot transform India's and Mongolia's staffing decisions into "commercial" activities, because how foreign governments deploy their diplomatic personnel is "peculiarly sovereign" in its very nature. *See Saudi Arabia v. Nelson*, 507 U.S. at 361 (recognizing that foreign state's "internal administrative acts" remain immune); *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000) (foreign government's decision how best to secure the safety of its leaders is "quintessentially an act 'peculiar to sovereigns'").[29] Since any reliance on the

[29] *Nelson* refers to the list of "public" activities that remain immune under the restrictive theory contained in *Victory Transport, Inc. v.*

(Continued on following page)

"commercial activity" exemption as a jurisdictional basis for the City's action would be without merit beyond cavil, this action should be remanded with directions that it be dismissed.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the judgment of the Second Circuit be reversed.

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Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 360 (2d Cir. 1964), which list also includes "acts concerning diplomatic activity."

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66 pkp

No. 06-134

IN THE

Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS and THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the exception to foreign sovereign immunity for cases "in which . . . rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality's lawsuit seeking a judgment establishing the validity of a property tax lien on a foreign sovereign's realty?

2. Is it appropriate for United States courts, when interpreting the Foreign Sovereign Immunities Act, to consider international treaties that, while not ratified by the United States, may nonetheless be relevant to establish the customary international law of foreign sovereign immunity contemporaneous with the adoption of the Act?

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TABLE OF CITED AUTHORITIES

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Cases

Abourezk v. Reagan, 785 F.2d 1043 (D.C. Cir. 1986), *affd. sub nom. Reagan v. Abourezk*, 484 U.S. 1 (1987) 42

Adams v. United States, 585 F.2d 1060 (Ct. Cl. 1978) 44

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) 32, 43

Arndt v. Griggs, 134 U.S. 316 (1890) 15

Associacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984) ..... *passim*

Baker v. Carr, 369 U.S. 186 (1962) 31

Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002) .. 8

Bertie's Apple Valley Farms v. United States, 476 F.2d 291 (9th Cir. 1973) 12

Birch Shipping Corp. v. Embassy of United Republic of Tanzania, 507 F. Supp. 311 (D. D.C. 1980) ... 43

Butner v. United States, 440 U.S. 48 (1979) 9

Butters v. Vance Int'l, Inc., 225 F.3d 462 (4th Cir. 2000) 44

Cavalier County v. Gestson, 31 N.W.2d 787 (N.D. 1948) 9, 16

Cited Authorities

Page

Chateau Lafayette Apts, Inc. v. Meadow Brook Nat'l Bank, 416 F.2d 301 (5th Cir. 1969) 37

City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31 (3rd Cir. 1985) ..... *passim*

City of New Rochelle v. Republic of Ghana, 255 N.Y.S.2d 178 (N.Y. County Ct. 1964) 26, 27

City of New York v. Permanent Mission of India to the United Nations, 376 F.Supp.2d 429 (S.D.N.Y. 2005) 4

City of New York v. Permanent Mission of India to the United Nations, 446 F.3d 365 (2d Cir. 2006) .. 4

Clark v. Darlington, 63 N.W. 771 (S.D. 1895) 11

Clark v. Uebersee Finanz-Korporation, A. G., 332 U.S. 480 (1947) 42

Conard v. The Atlantic Insurance Co., 26 U.S. 386 (1828) 12

Connecticut Bank of Commerce v. The Republic of Congo, 309 F.3d 240 (5th Cir. 2002) 40, 41

County Board v. German Democratic Republic, Civil No. 78-293-A, reprinted at 17 I.L.M. 1404 (E.D. Va. Sept. 6, 1978) 27

De Letelier v. The Republic of Chile, 748 F.2d 790 (2d Cir. 1984) 40

Cited Authorities

Page

Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) 11

Edward Joy Co., Inc. v. McGuire & Bennett, Inc., 608 N.Y.S.2d 134 (N.Y.A.D. 1993) 16

Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002) 29

First State Bank-Keene v. Metroplex Petroleum Inc., 155 F.3d 732 (5th Cir. 1998) 9

Haebler v. Myers, 30 N.E. 963 (N.Y. 1892) 9

Honoye Central School Dist. v. Berle, 415 N.Y.S.2d 565 (N.Y.S. Ct. 1979) 16

Huling v. Kaw Valley Railway, 130 U.S. 559 (1889) 15

In re Oyster Bay Cove, Ltd., 161 B.R. 338 (Bankr. E.D.N.Y. 1994), *aff'd*, 196 B.R. 251 (E.D.N.Y. 1996) 11

Japan Whaling Asso. v. American Cetacean Soc., 478 U.S. 221 (1986) 31

Joseph v. Office of the Consulate, 830 F.2d 1018 (9th Cir. 1987), *cert. denied sub nom. Consulate General v. Joseph*, 485 U.S. 905 (1988) 43

Kiowa Tribe v. Manufacturing Techs., 523 U.S. 751 (1998) 30

Cited Authorities

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Knockling Corp. v. Kingdom of Afghanistan, 167 N.Y.S.2d 285 (N.Y. County Ct. 1957)	26
L.K. Land Corp. v. Gordon, 136 N.E.2d 500 (N.Y. 1956)	14
L-C Security Service Corp. v. State, 434 N.Y.S.2d 883 (N.Y. Ct. Cl. 1980)	10
MacArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918 (D.C. Cir. 1987)	29
Marine Midland Bank v. Marcal Enterprises, 398 N.Y.S.2d 782 (N.Y. Co. Ct. 1977)	12
Marshall v. Knox, 83 U.S. 551 (1872)	8
Massingill v. Downs, 48 U.S. 760 (1849)	12
Matagorda County v. Law, 19 F.3d 215 (5th Cir. 1994)	9
McClatchie v. Rector, Church Wardens & Vestrymen, 118 N.Y.S.2d 648 (N.Y. S. Ct. 1953)	16
Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)	9
Merrill Realty Co., Inc. v. Harris, 353 N.Y.S.2d 570 (N.Y.A.D. 1974)	16
Ormsby v. Ottman, 85 F. 492 (8th Cir. 1898)	11
Pennoyer v. Neff, 95 U.S. 714 (1878)	15

Cited Authorities

Page

Pittsburgh & L. E. R. Co. v. Railway Labor Executives' Ass'n, 491 U.S. 490 (1989) 42

Pasquantino v. United States, 544 U.S. 349 (2005) ... 9

Republic of Argentina v. City of New York, 250 N.E.2d 698 (N.Y. 1969) 14, 26, 32, 34

Republic of Argentina v. Weltover, 504 U.S. 607 (1992) 7, 19, 43

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 22, 31

Republic of France v. City of New York, 74 N.Y.L.J. 1279, Dec. 30, 1925 (N.Y. Sup. Ct. 1925) 33

Robertson v. Chinnow, 68 N.W.2d 909 (1955) 16

Rowan v. United States, 452 U.S. 247 (1981) 44

Saudi Arabia v. Nelson, 507 U.S. 349 (1993) ... 7, 20, 43

Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572 (1980) 42

Shaffer v. Heitner, 433 U.S. 186 (1977) 15, 18

Southwest Land Inv. v. Hubbart, 867 P.2d 412 (N.M 1993) 14

The J.E. Rumbell, 148 U.S. 1 (1893) 8

Cited Authorities

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Travis v. Sheriff of Cortland Co., 90 N.Y.S.2d 848 (N.Y. A.D. 1949) 10

United States of Mexico v. Schmuck, 62 N.E.2d 64 (N.Y. 1944) 26

United States v. Alabama, 313 U.S. 274 (1941) 11, 41

United States v. County of Arlington, 669 F.2d 925, 928 (4th Cir. 1982), *cert. denied sub nom. County of Arlington v. United States*, 459 U.S. 801 (1982), *appeal after remand sub nom. United States v. County of Arlington*, 702 F.2d 485 (4th Cir. 1983) 27

United States v. Fox, 94 U.S. 315 (1877) 17

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 8-9

Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 19, 30

Ward v. Chamberlain, 67 U.S. 430 (1862) 12

Weeks, Kavanaugh & Rendeiro v. Blake, 2001 U.S. Dist. LEXIS 10386 (E.D. La. July 17, 2001) 37

Weinstein v. Taylor, 234 N.Y.S.2d 926 (N.Y. S. Ct. 1962), *aff'd* 242 N.Y.S.2d 707 (N.Y. A.D. 1963) 10

Cited Authorities

Page

York River House v. Pakistan Mission to the U.N., 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y. 1991) ... 30, 40

York River House v. Pakistan Mission, 820 F. Supp. 760 (S.D.N.Y. 1993) 30

Zaccaro v. Cahill, 800 N.E.2d 1096 (N.Y. 2003) ... 14

Statutes

26 U.S.C. § 119(a)(2) 44

28 U.S.C. § 1603(d) 42

28 U.S.C. § 1605(a)(2) 4, 7, 42

28 U.S.C. § 1605(a)(4) ..... *passim*

28 U.S.C. § 1609 ..... 15, 40

28 U.S.C. § 1610 ..... 15, 18, 40

28 U.S.C. § 1655 15

Consolidated Appropriations Act of 2005, Public Law 108-447, § 543(1) (2004) 42

Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2006) 42

New York City Charter § 1519(2) 10

Cited Authorities

	Page
New York Em. Dom. Proc. L. § 103 (2007)	10
New York Em. Dom. Proc. L. § 505 (2007)	10
N.Y.C. Administrative. Code §§ 11-301 to 11-329 ...	10
N.Y.C. Administrative Code § 11-301	3
N.Y.C. Administrative. Code § 11-332	10
N.Y.C. Administrative. Code § 11-333	10
N.Y.C. Administrative Code § 11-338	4
N.Y.C. Administrative Code § 11-354	3
New York Real Property Tax L. § 418	2, 5
Legislative Materials	
House Report No. 1487, 94th Cong., 2d Sess., at 20-21, reprinted in 1976 U.S. Code Cong. & Ad. News 6604, at 6618-19	*passim*
Treaties and Conventions	
European Convention on State Immunity, May 16, 1972, CETS No. 74	22
United Nations Convention on Jurisdictional Immunities of States and Their Property, 44 I.L.M. 803 (2004)	23

Cited Authorities

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Vienna Convention on Consular Relations, 21 U.S.T. 77 (U.S.T. 1969) 2

Vienna Convention on Diplomatic Relations Art. 22, 23 U.S.T. 3227 (U.S.T. 1961) 34, 39

Vienna Convention on Diplomatic Relations Art. 23, 23 U.S.T. 3227 (U.S.T. 1961) 2, 18

Vienna Convention on Diplomatic Relations Art. 31, 23 U.S.T. 3227 (U.S.T. 1961) 36, 37, 38

Vienna Convention on Diplomatic Relations Art. 34, 23 U.S.T. 3227 (U.S.T. 1961) 36

Vienna Convention on Diplomatic Relations Art. 37, 23 U.S.T. 3227 (U.S.T. 1961) 36

Diplomatic Materials

U.S. Dept. of State, Diplomatic Note, 1955, in *Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities*, U.N. Leg. Series v. VII (1958) 25

U.S. Dept. of State, Diplomatic Note HC-06-93, February 17, 1993 1

U.S. Dept. of State, Diplomatic Note HC-12-01, April 5, 2001 1

U.S. Dept. of State, Diplomatic Note HC-18-93, April 14, 1993 19

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U.S. Dept. of State, Guidance for Administrative Officers § 7.8, January 4, 2004 2

U.S. Dept. of State, http://www.state.gov/documents /organization/27910.pdf (labeled by State Department website as "reviewed/updated 3/27/06) 3

U.S. Dept. of State, Real Property, Taxation & Parking FAQ, http://www.state.gov/ ofm/resource/ 30294.htm. 35

Cases — Other Countries

Claim Against Empire of Iran Case, 38 I.L.R. 57 (Fed'l Cont'l Ct., Fed'l. Rep. of Germany 1963) .. 20, 38

Deputy Registrar Case, 94 I.L.R. 308 (District Court of the Hague, The Netherlands 1980) 37

Gobierno de Italia v. Consejo Nacional de Educacion, 1941-1942 Ann. Dig. 196 (Camera Civil de la Capital, Argentina 1940) 33

Hungarian Embassy Case, 65 I.L.R. 110 (Fed. S. Ct., Fed. Rep. of Ger. 1969) 24

Intpro Properties (U.K.) Ltd. v. Sauvel, QB 1019 (Queen's Bench, United Kingdom 1983) 34, 38

Jurisdiction Over Yugoslav Military Mission (Germany) Case, 38 I.L.R. 162 (Fed. Const'l Ct., Fed. Rep. of Ger. 1962) 39

Cited Authorities

Page

Purchase of Embassy Staff Residence Case, 65 I.L.R. 255 (Trib. of First Instance, Athens, Greece 1967) 25

Reference re Tax on Foreign Legations, 2 D.L.R. 481 (Sup. Ct. of Canada) 9, 20, 35

Rep. of Latvia Case, 1955 I.L.R. 230 (Higher Ct. of App., Fed'l. Rep. of Germany 1955) 20

Restitution of Property (Rep. of Italy) Case, 1951 I.L.R. 221 (Ct. of App. of Ham., Fed. Rep. of Ger. 1951) 25

Robine v. Consul of Great Britain 1950 I.L.R. 140 (Ct. of App. of Bordeaux, France 1950) 20

Suit Against Hungary, 1927-28 I.L.R. 174, 175 (Sup. Ct. Czechoslovakia 1928) 21, 24

Syquia v. Lopez 1951 I.L.R. 228, 230-31 (No. 55) (S. Ct. of the Philippines 1949) 20

Thai-Europe Tapioca Service Ltd. v. Government of Pakistan, 3 All E.R. 961 (Eng., Ct. of App. Civ. Div. 1975) 25

U.S. Government v. Bracale Bicchierai, 65 I.L.R. 273 (Ct. of Appeal of Naples, Italy 1968) 24

Cited Authorities

Page

Statutes – Other Countries

Code of Civ. Proc. (India) § 86, in U.N. Leg. Series, v. VII, Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities (1958) ... 25

Decree No. 615 of 6 April 1935 to Define the Privileges and Immunities of Foreign Diplomatic Agents (Colombia 1935) in 7 U.N. Legislative Series at 64 33

Immunity Act of 1978 § 6, 17 I.L.M. 1123 (United Kingdom, 1978) 23

Rules of the Federal Political Dept. on Diplomatic and Consular Privileges (Switzerland, 1956), in 7 U.N. Legislative Series at 308 33

Commentaries, Treatises and Restatements

51 Am. Jur. 2d, Liens § 1 (2003) 8

56 Am. Jur. Venue, § 11, 1954 Supp. 16

J. V. Dempsey, Lien as Estate or Interest in Land Within Venue Statute, 2 A.L.R. 2d 1261 (1948) ... 16

Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (2d ed. 1998) 34, 35, 37, 39

Cited Authorities

Page

Harvard Research in International Law, Draft Convention on the Competence of Courts in Regard to Foreign States, Art. 9, 26 Am. J. Int'l L., Supp. 455 (1932) 21

C.C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2d ed. 1945) ... 21

M. Mitzner, *Liens and Encumbrances*, in Pedowitz, *Real Estate Titles*, § 9.0 (1984) 8, 13

75 N.Y. Jur.2d, Liens § 5 (2000) 10

5 Powell, Law of Real Property § 39.04[2] (2004) ... 10

Restatement (Second) of the Foreign Relations Law of the United States § 64 (1962) 22

Restatement (Second) of the Foreign Relations Law of the United States § 65 (1962) 22

Restatement (Second) of the Foreign Relations Law of the United States § 68 (1962) 21, 24, 27, 28

Restatement (Third) of the Foreign Relations Law of the United States (1986) 22

Restatement (Third) of the Foreign Relations Law of the United States § 401 (1986) 40

Restatement (Third) of the Foreign Relations Law of the United States § 431 (1986) 41

Cited Authorities

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Restatement (Third) of the Foreign Relations Law of the United States § 455 (1986) 22, 28

Restatement (Third) of the Foreign Relations Law of the United States § 463 (1986) 41

2A N. Singer, Sutherland Statutory Construction § 46.06 (4th ed. 1984) 42

S. Sucharitkul, Fifth Report on Jurisdictional Immunities of States and Their Property, 1983 I.L.C. Yearbook 84 17

S. Sucharitkul, *Immunities of Foreign States Before National Authorities*, 97, in 1976 Recueil des Cours Recueil des Cours (Collected Courses of the Hague Academy of International Law, 1976) 38, 41

5 H.T. Tiffany, The Law of Real Property § 1581 (3d ed. 1939) 10, 11

Miscellaneous

1957 I.L.C. Yearbook 94 37

1991 I.L.C. Yearbook 84 24

Black's Law Dictionary 941 (8th ed. 1999) 8

Moore's Federal Practice § 4.02 (3d ed. 2006) 16

U.N. Leg. Series, v. VII, Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities (1958) 33

Cited Authorities

Page

Council of Europe, CETS 74 Status, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp 23

Explanatory Report to European Convention on State Immunity at p. 113-114, http://www.conventions.coe.int/Treaty/en/Treaties/Word/074.doc. 24

Explanatory Report to the European Convention on State Immunity I.L.C. Fifth Report 51 23

Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976) 32

Statement by Eric Rosand, Deputy Legal Counselor, U.S. Mission to the United Nations, Oct. 25, 2004 (*http://www.usunnewyork.usmission.gov/04_206.htm*) 23

Summary Records of the Meeting of the Forty-third session, 1991 Yearbook of the I.L.C 84 24

Testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice, in support of legislation that became the FSIA, before the House Committee on the Judiciary, Subcommittee on Claims and Governmental Relations, Hearing on H.R. 3493 (June 7, 1973) 41

Cited Authorities

Page

United Nations, Office of Treaty Affairs, Status of Multilateral Treaties Deposited With the United Nations (2007), http://untreaty.un.org. 23

Warren's Weed New York Real Property § 91.34 (4th ed. 2002) 14

STATEMENT OF THE CASE

The Permanent Mission of India to the United Nations ("India") and the Permanent Representative of Mongolia to the United Nations ("Mongolia") (collectively referred to as "petitioners") each own and operate multi-story properties in midtown Manhattan in New York City. The upper twenty floors of India's building are devoted exclusively to housing for staff of India's Permanent Mission to the United Nations and of the Indian consulate in New York. All of these staff — including attaches, first and second secretaries, counselors and chauffeurs — are below the level of head of mission (JA97-101). The top three floors of Mongolia's building are devoted exclusively to housing for staff of Mongolia's Permanent Mission to the United Nations. They, too, are below the level of head of mission, and include attaches, first, second and third secretaries, administrative officers and drivers (JA156-157). The remaining floors of each building are used as offices of petitioners' United Nations missions, and in Mongolia's case, as the ambassador's residence, and are concededly exempt from local taxation.

When India first occupied its premises, in 1993, the United States Mission to the United Nations informed India that only the portion of its building that housed the Permanent Mission itself and the residences of the Permanent Representative or the Consul General were tax exempt. In a Diplomatic Note, the United States advised India (U.S. Dept. of State, HC-06-93, February 17, 1993, JA181-182) (emphasis added).

> The Mission is reminded that exemption from property taxes is available only for that portion of the building used to house the Permanent Mission, which the United States Mission understands will occupy the first four floors of the building, and the residences of the Permanent Representative and the Consul General. *The remainder of the building . . . will be subject to New York City property taxes.*

Also in 1993, the State Department issued a Diplomatic Note to all countries' missions to the United Nations reminding them of their obligation to pay local real estate tax on properties used for staff housing in the New York metropolitan area. U.S. Dept. of State, Diplomatic Note HC-18-93, April 14, 1993 (JA187).

In 2001, the State Department, citing the 1961 Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 (U.S.T. 1961), in force, 1972 (the "Vienna Convention") and the 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, Art 32 (U.S.T. 1969), in force, 1969 (collectively, the "Vienna Conventions"), issued another Diplomatic Note reiterating the obligations of all missions to the United Nations to pay local real estate tax on properties used for staff housing. U.S. Dept. of State, Diplomatic Note HC-12-01, April 5, 2001 (JA189-91).[1]

As recently as 2004, subsequent to the commencement of the suits at bar, the State Department advised all foreign governments (U.S. Dept. of State, Guidance for Administrative Officers § 7.8, January 4, 2004 (JA177):

> Absent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations, except . . . for career

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[1] The Diplomatic Note stated:

> The government- or mission-owned residence of any individual at the Permanent Mission with the title of Ambassador or Minister Plenipotentiary . . . is also exempt from property tax under New York Real Property Tax Law [§] 418. The residence of the Chief of Mission of a consular post enjoys tax exemption under the Vienna Convention on Consular Relations. *All other residential property owned by the Permanent Mission or the sending state and occupied by a diplomat or mission member of lesser rank is subject to property tax . . . .*

(Emphasis added.)

> heads of the consular posts or chiefs of missions to the international organizations.[2]

As reflected by the State Department's present website, this remains the State Department's position today.[3]

The City of New York (the "City") assessed real property taxes, as well as sidewalk repair and elevator charges (JA74-75), on the residential portions of petitioners' properties, excluding the portion of Mongolia's property occupied by its ambassador to the United Nations. Those taxes have not been paid. As of January 31, 2003, India owed $16,376,702.09 (JA19, 29), and Mongolia owed $2,068.995.00 (JA41, 44). These amounts continue to grow through the imposition of interest charges and additional yearly tax assessments.

In New York City, unpaid real property taxes become liens on the property:

> All taxes and all assessments and all sewer rents, sewer surcharges and water rents, and the interest and charges thereon, which may be laid or may have heretofore been laid, upon New York real estate now in the city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges.

N.Y.C. Administrative Code § 11-301.

These actions, brought in state court and removed to federal court, were commenced pursuant to N.Y.C. Administrative Code § 11-354, which authorizes foreclosure of tax liens, and

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[2] In contrast to its treatment of the United Nations' missions, the State Department has, with applicability only to embassies and consulates within the Washington, D.C. metropolitan area, extended real property tax exemptions to include premises used to house diplomatic staff, subject to reciprocal treatment of similar United States-owned property in foreign capitals (JA177).

[3] *See* http://www.state.gov/documents /organization/27910.pdf. (labeled by the State Department website as "reviewed/updated 3/27/06") (last reviewed 3/29/07).

§ 11-338, under which "the plaintiff shall be entitled to a judgment establishing the validity of the tax lien so far as the same shall not be adjudged invalid." The City recognizes that it cannot foreclose against the present owners.

Petitioners' motions to dismiss the complaints for lack of subject matter jurisdiction were denied by the District Court, Pet. App. 25, *City of New York v. Permanent Mission of India to the United Nations,* 376 F.Supp.2d 429, 439 (S.D.N.Y. 2005) (Casey, J.), which ruled it had jurisdiction under the immovable property exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(4). The Court based its conclusion upon "[t]he international practice that the immovable property exception codifies and the legislative history of the FSIA," and on the fact that "the tax liens place [petitioners'] and the City's rights in the properties in issue." Pet. App. 44, 376 F.Supp.2d at 439. The District Court noted that the FSIA's immovable property exception recognized "what is understood in domestic property jurisprudence to be the 'local action rule,'" requiring that the determination of rights in real property be judicially determined by the jurisdiction in which it is sited. Pet. App. 36, 376 F.Supp.2d at 434.

The United States Court of Appeals for the Second Circuit unanimously affirmed. Pet. App. 1, *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365 (2d Cir. 2006). Judge Katzmann's opinion noted that the court had "carefully considered . . . the United States' arguments sounding in public policy" — whose views it had requested — and found them "not presently to justify a dismissal on foreign policy grounds." Pet. App. 22 n. 17, 446 F.3d at 377 n. 16. Like the District Court, the Court of Appeals did not reach the City's alternate contention that jurisdiction could also be found under the commercial activity exception of 28 U.S.C. § 1605(a)(2).

Whether the properties at issue are subject to taxation turns primarily on interpretation of the Vienna Convention. The City asserts that the properties are taxable because the Convention,

as well as New York Real Property Tax L. § 418(1), exempt from taxation only the mission, the consulate, and the residences of the chief of mission and of the consul general, and not staff housing. Petitioners, in contrast, read the Vienna Convention as exempting staff housing as well (Pet. Br. 3-4, 30).

SUMMARY OF ARGUMENT

1. The courts have jurisdiction to adjudicate the validity of the tax liens at issue under 28 U.S.C. § 1605(a)(4), which provides for jurisdiction when "rights in immovable property . . . are in issue." The statute's plain language does not limit this immunity exception to disputes over only certain types of rights in immovable property.

2. Courts have consistently held that liens, including tax liens, are rights the lien holder has in the property of the owner. A tax lien also puts in issue the fee owner's title and right to possession. This suit over the liens' validity therefore puts in issue both petitioners' and respondent's rights in immovable property. The legislative history of the FSIA, on which petitioners and the United States rely, makes clear that the immovable property exception was intended to cover questions of "ownership, rent, servitudes and similar matters," which phrase encompasses liens. The local action rule, whose principles underlie the immovable property exception, provides that rights in real property, including liens, are properly adjudicated only by the courts where the property is located.

3. Contrary to the arguments of petitioners and the United States, the property tax liens at issue here are not a "bootstrapping" device comparable to a pre-judgment attachment that the City has created as an artifice to obtain personal jurisdiction over petitioners in some unrelated dispute. Rather, they create rights in the City and impair the rights of petitioners in the same way as would be the case regardless of who owns the property. These rights give rise to subject matter jurisdiction here.

4. The FSIA codifies the restrictive view of foreign sovereign immunity in international law. International law, as summarized in the Second and Third Restatements of Foreign Relations Law, and as expressed by foreign and domestic case law, commentators and international conventions, recognizes that jurisdiction under the restrictive view extends to disputes concerning mortgages and liens.

5. With the exception of *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3rd Cir. 1985), United States case law, including *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), has indicated that the rights referred to in § 1605(a)(4) extend to all rights that affect title.

6. According to petitioners and the United States, the FSIA is to be interpreted in light of the Vienna Conventions. Those Conventions, as is made clear by consistent interpretations of the State Department, including statements appearing on the State Department's website today, permit taxation of the property at issue here. The Vienna Convention's provisions concerning the jurisdictional immunity of diplomatic agents would not bar jurisdiction in a case involving diplomatic staff housing, even if the owners were diplomatic agents, much less when, as here, the owners are the sovereigns themselves.

7. That the FSIA would prohibit execution of any judgment here is irrelevant, since the basic structure of the FSIA contemplates jurisdiction even in the absence of a right to execute. It is a truism of the law of foreign sovereign immunity that there can be adjudication without enforcement, and that foreign sovereigns obey the judgments of impartial courts. Recent Appropriations Acts provide for deduction from foreign aid for those countries that fail to pay judgments, giving additional incentive to foreign governments to comply with any judgment that might be rendered. Relegating enforcement of respondent's rights to diplomacy would be contrary to the purpose of the FSIA, and would render substantially meaningless those Appropriations Acts.

8. The courts also have jurisdiction to adjudicate these proceedings under the commercial activity exception of 28 U.S.C. § 1605(a)(2). That exception applies when the foreign government, regardless of its purpose, "acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992). Providing housing to employees, the activity giving rise to this dispute, is not unique to diplomacy or the exercise of sovereignty, but can be engaged in by private citizens as well. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

ARGUMENT

I. THE COURTS OF THE UNITED STATES HAVE JURISDICTION OF THIS DISPUTE UNDER THE "RIGHTS IN IMMOVABLE PROPERTY" EXCEPTION TO THE FSIA.

A. THE LANGUAGE OF THE STATUTE SUPPORTS JURISDICTION FOR SUITS TO RECOGNIZE PROPERTY TAX LIENS.

Section 1605(a)(4) of the FSIA provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which . . . rights in immovable property situated in the United States are in issue." Throughout their briefs, petitioners and the United States repeat that "the provision confers jurisdiction over disputes regarding rights in the property itself, such as title, easements, or possession," yet argue, without any support in the statutory language, that a tax lien, which if valid could lead both to title in and possession of the property by the lien holder, is not a right in property (*e.g.*, Pet. Br. at 15; U.S. Br. at 6, 7, 18, 21, 22). But as the court below noted, the statute

> certainly does not specifically exclude cases in which the right at issue is a lien. Nor does the plain language restrict this provision to cases where the *foreign government's* rights in the property are in issue . . . ;

> a purely textual analysis suggests that it would suffice that the City's rights in the property (which are simply the flip side of the defendants' obligations with respect to the property) are in dispute.

Pet. App. at 8; 446 F.3d at 369 (emphasis in original).

As with any question of statutory interpretation, the language of the statute is paramount. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). This case is not, as petitioners would have it, a "tax enforcement lawsuit," Pet. Br. at 23, 28, but rather an action seeking "a judgment establishing the validity" of a property tax lien (JA25, 40). By seeking such a declaration this action places in issue both respondent's and petitioners' rights in property. Whether or not petitioners' underlying tax obligations are, in the language of the Second Circuit opinion, "an obligation arising out of the use of the property," Pet. App. 17-18, 446 F.3d at 374, is irrelevant to the Court's inquiry into whether or not a property tax lien is a right in property, and petitioners' attack on that language is beside the point.

1. The City's Rights in Petitioners' Properties are In Issue.

By definition, a property tax lien is a right that the lien holder has in the property of the fee owner. Black's Law Dictionary 941 (8th ed. 1999) (lien defined as "legal right or interest that a creditor has in another's property").[4] This Court has described a lien as "a property in the thing," *The J.E. Rumbell*, 148 U.S. 1, 10 (1893), and as a "right [that] may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and . . . in fact, a species of property in the thing." *Marshall v. Knox*, 83 U.S. 551, 557 (1872). *See United States v. Security Industrial*

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[4] *See also* 51 Am. Jur. 2d, Liens § 1 (2003) (lien defined as "a qualified right of property that a creditor has in or over specific property"); M. Mitzner, *Liens and Encumbrance* in Pedowitz, *Real Estate Titles* § 9.0 (1984) (liens "consist of a right to or an interest in land").

Bank, 459 U.S. 70, 76 (1982) ("[t]he 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but . . . no cases support the proposition that differences such as these relegate the secured party's interest to something less than property").

In various contexts, liens have been held to be rights in the property to which they attach.[5] Those property rights are created and defined by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979).[6] Under New York law, a lien on realty is defined as "a possessory right in the encumbered property with a concomitant right to sell that property if the debt is not satisfied."

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[5] *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983) (mortgagee has "a substantial property interest" that entitles it to notice consistent with Fourteenth Amendment due process requirements); *Security Industrial Bank*, 459 U.S. at 77 (statute invalidating liens is unconstitutional taking); *First State Bank-Keene v. Metroplex Petroleum Inc.*, 155 F.3d 732, 739 (5th Cir. 1998) (mortgage lien creates equitable rights in property); *Armstrong v. United States*, 364 U.S. 40, 44, 48 (1960) (extinguishing of lien is unconstitutional taking); *Cavalier County v. Gestson*, 31 N.W.2d 787, 792 (N.D. 1948) (lien is "right of property" for purposes of local action rule); *Haebler v. Myers*, 30 N.E. 963, 965 (N.Y. 1892) ("lien is property in the broad sense of the word"). *Cf. Pasquantino v. United States*, 544 U.S. 349, 356-57 (2005) (a government's right to revenue obtained from taxation is property); *Matagorda County v. Law*, 19 F.3d 215, 224 (5th Cir. 1994) (property interest may include taxes due as well as tax lien). *See also Reference re Tax on Foreign Legations*, 2 D.L.R. 481, 500 (Sup. Ct. of Canada, 1943) (enforcement of tax lien is "assertion of 'a right . . . over the property of a foreign sovereign'").

[6] This Court has recognized the value of incorporating state law into federal bankruptcy statutes in order that property interests, including security interests, are treated uniformly within each state, even where this would lead to different outcomes in different states. *Butner*, 440 U.S. at 54-55. Similarly, in enacting the FSIA, Congress sought to achieve results governed by application of state law legal principles governing "rights in property." There is no evidence that Congress sought a uniformity of outcomes in situations where state property law might provide otherwise.

75 N.Y. Jur.2d, Liens § 5, at 138 (2000). *See Travis v. Sheriff of Cortland Co.*, 90 N.Y.S.2d 848 (N.Y. App. Div. 1949) (holder of a lien has a "special property interest in the object of his lien"). In New York, contrary to the contentions of petitioners and the United States, a lienor is, by statute, a condemnee and a necessary party in condemnation proceedings. New York Em. Dom. Proc. L. §§ 103, 505 (2007).[7] New York City property tax liens are perpetual in duration, and may be sold or assigned. New York City Charter § 1519(2); N.Y.C. Admin. Code §§ 11-301 to 11-329, 11-332, 11-333. Like all liens, they run with the land. 5 Powell, Law of Real Property § 39.04[2] (2004).

Because a lien is a right the lien holder has in the fee owner's property, it follows that an action to declare whether or not the lien is valid places the lien holder's rights in that property in issue.

Petitioners and the United States rely on the ancient formalism that a judgment lien is "no property or right in the land itself" (*e.g.* U.S. Br. at 21-22). Even the source they cite, however, questions the meaning and accuracy of this formulation 5 H.T. Tiffany, The Law of Real Property § 1581 (3d ed. 1939):

> The exact significance of the statement that the [judgment] lien does not involve any property or right in the land is not entirely clear. . . . The lien of a judgment differs from other liens, however, in that it attaches not to any specific land, but to all the land owned by the debtor. . . . And it would seem that it is this general nature of the judgment lien, rather than

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[7] *Weinstein v. Taylor*, 234 N.Y.S.2d 926 (N.Y. S. Ct. 1962), *aff'd* 242 N.Y.S.2d 707 (N.Y. App. Div. 1963), cited by petitioners and the United States (Pet. Br. at 34; U.S. Br. at 21), has been superseded by statute. *See L-C Security Service Corp. v. State*, 434 N.Y.S.2d 883, 884-85 (N.Y. Ct. Cl. 1980) ("Chapter 40 of the Laws of 1977 . . . amended section 9 of the Court of Claims Act to provide that a real property tax lien was an interest in real property for purposes of filing an appropriation claim").

> the fact that it does not involve any proprietary right in the land, that serves to distinguish it from other liens.[8]

The cases cited by petitioners and the United States do not support their argument because the distinction this formalism highlights is irrelevant to the FSIA's concerns. As the United States agrees, § 1605(a)(4) embodies the United States' sovereign interest in controlling its own land. However, contrary to the contention of the United States, the recognition of liens is indeed "at the heart of the domestic sovereign's 'primeval interest in resolving disputes over use or right to use of real property within its own domain,'" because liens affect title (*cf.* U.S. Br. at 24, citing *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d at 1517, 1521 (D.C. Cir. 1984). Thus, in a very real and practical sense, they are rights in property.

Courts have recognized this in a closely related context where the same interest is at stake, *i.e.*, in actions to clear clouds on title. In that context, they have rejected the contention that a lien is not a right in property within the meaning of statutes to quiet title. *Ormsby v. Ottman*, 85 F. 492, 495-96 (8th Cir. 1898) (noting that whether or not a lien is a right in property depends on the purpose and context of the statute); *Clark v. Darlington*, 63 N.W. 771, 772 (S.D. 1895).[9] *See*, in context of action to remove tax lien, *United States v. Alabama*, 313 U.S. 274, 281-82 (1941) (even though a local property tax lien could not be

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[8] The United States also claims, citing this same section of Tiffany § 1559, that "[e]arly common law did not even recognize a lien on land." U.S. Br. at 22. However, as that section states, liens on land have been recognized as equitable rights since the Statute of Westminster II in 1285.

[9] In contrast to the cases cited above, none of the cases cited by petitioners and the United States are in contexts that are relevant here. In *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999), the court rejected plaintiff's argument that a statute waiving U.S. sovereign immunity for injunctive claims applied to equitable liens on U.S. Army funds. In *In re Oyster Bay Cove, Ltd.*, 161 B.R. 338, 343 (Bankr. E.D.N.Y. 1994), *aff'd*, 196 B.R. 251 (E.D.N.Y. 1996), the court held that where the terms of a bankruptcy sale explicitly preserved non-

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enforced against land owned by the United States, the Court adjudicated the lien's validity because it would affect title and ability to sell the land).

Petitioners and the United States rely on legislative history in support of their narrow reading of the meaning of "rights in property." The passage contained in the legislative history to which they point (Pet. Br. at 33; U.S. Br. at 22-24) states that "a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes and similar matters, as long as the foreign state's possession of the premises is not disturbed." House Report No. 1487, 94th Cong., 2d Sess., at 20-21, reprinted in 1976 U.S. Code Cong. & Ad. News ("U.S.C.C.A.N.") 6604, at 6618-19 ("House Report"). This passage, they argue, compels the conclusion that liens are not among the rights encompassed within § 1605(a)(4), because unlike a claim to title or possession or for enforcement of a servitude, "[t]he lien . . . does not amount to an interest in the real property itself." This argument overlooks the essence of what a lien is. Not only do liens implicate ownership and

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monetary restrictions, such a restriction survived even though the sale was free and clear of "all liens, claims, encumbrances and rights of others of whatever kind." *Ward v. Chamberlain*, 67 U.S. 430, 437 (1862), held that a judgment in admiralty could be enforced through a lien on lands. The Court's statement that "a lien constitutes no property or right in the land" was preceded by the word "Although," and was in any event *dictum*. *Massingill v. Downs*, 48 U.S. 760, 767 (1849), concerned whether a lien on slaves, although not recorded, was nevertheless valid. Again, the formalistic recitation is *dictum*. In *Conard v. The Atlantic Insurance Co.*, 26 U.S. 386, 443 (1828), the Court explained that liens were different from estates in property in that they only gave the lien holder the right to levy on the property of the debtor, not the right to pursue the proceeds in the hands of the vendor. *Marine Midland Bank v. Marcal Enterprises*, 398 N.Y.S.2d 782 (N.Y. Co. Ct. 1977), and *Bertie's Apple Valley Farms v. United States*, 476 F.2d 291 (9th Cir. 1973), both construe statutes that explicitly distinguish between various interests in real property.

possession, but in many respects they are similar to servitudes. The District Court observed that both are encumbrances, both are defined as "charges" on property, both run with the land, and both "directly affect the property owner's rights to alienate." Pet App. at 37, 476 F.Supp.2d at 436; *see also* M. Mitzner, *Liens and Encumbrances* § 9.0.

Petitioners' interpretation of the House Report as excluding liens, said the Second Circuit, "has no corollary in the text actually adopted by Congress, which imposes no such limitations on the types of property rights that permit jurisdiction." Pet. App.11 n. 7; 446 F.3d at 371 n.6. *See also* House Report at 20, U.S.C.C.A.N. at 6618 ("Section 1605(a)(4) denies sovereign immunity in litigation relating to rights in real estate").

The United States itself explained, in its *amicus curiae* submission in support of reargument in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985), why, in interpreting the FSIA, a lien must be viewed as similar to a servitude:

> An action relating to a servitude would not, generally, deprive the land owner of title or possession . . . Thus, the Court's interpretation of Section 1605(a)(4), if read literally, would deny jurisdiction in cases which Congress explicitly had intended to make justiciable, and would render the phrase "servitudes and similar matters" largely a nullity. . . . [T]ax liens have as much a relationship to "title" or "possession" as do rents and servitudes, and, in any event, are encompassed within "similar matters."

U.S. *Amicus* Br. in *City of Englewood* at 7; *see also id.* at 10 ("As a Matter of Property Law, Disputes Which Involve Tax Liens Involve Rights In Immovable Property").

2. Petitioners' Rights in the Properties Are Also In Issue.

This action places in issue not only the rights of the lien holder in the fee owners' properties, but equally the rights of

the fee owners themselves to unburdened ownership and possession. As the District Court wrote, "the presence of a tax lien means that the owner does not have the power to convey full rights and title to another purchaser. . . . [A] suit adjudicating the validity of such lien therefore puts in issue the owner's rights in that property." Pet. App at 30; 376 F.Supp.2d at 435-36.

The ordinary lien foreclosure action places ownership and possession directly and immediately in issue, because it causes the fee owner to lose both title and possession. The immunity of petitioners' properties from attachment and execution does not alter the fact that, as in cases brought to quiet title, petitioners' rights in their property are in issue (*See supra* at pp. 11-12). An outstanding lien affects title by rendering it unmarketable. Warren's Weed New York Real Property § 91.34 (4th ed. 2002). A tax lien on a foreign government's property has "an immediate adverse effect upon the amount which the [foreign] government would receive on a sale," and "constitute[s] a direct interference with the property of a foreign state." *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969).[10] If not discharged, the liens will not only reduce the amount the foreign sovereign property owner will realize when it sells the property, but will ultimately serve to divest the eventual non-diplomatic title-holder of both title and possession.

Nothing in the language of § 1605(a)(4) states that to fit within the immovable property exception a claim must seek immediately to divest the fee owner of ownership or possession, as argued by petitioners and the United States. The question of whether rights are in issue therefore cannot turn on the fortuity that enforcement of those rights by execution or attachment is

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[10] Other courts have also held that liens have a substantial effect on the rights of the fee owner. *See, e.g., Southwest Land Inv. v. Hubbart*, 867 P.2d 412 (N.M. 1993); *Zaccaro v. Cahill*, 800 N.E.2d 1096 (N.Y. 2003) (tax liens "substantially affect the rights of property owners"); *L.K. Land Corp. v Gordon*, 136 N.E.2d 500 (N.Y. 1956).

prohibited by the FSIA. Indeed, were that the case, no claim under § 1605(a)(4) could ever be enforced, because even a successful claimant under that section would be barred by the foreign sovereign's immunity from attachment and execution guaranteed by 28 U.S.C. §§ 1609-1610. Petitioners' and the United States' interpretation of the exception would therefore render it a nullity.

3. *Section 1605(a)(4) Embodies the Rule that the Jurisdiction of the Situs Has Control Over Property Within its Territorial Limits.*

This Court has long recognized that a State "has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto." *Arndt v. Griggs*, 134 U.S. 316, 320-21 (1890); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.'") (*quoting Pennoyer v. Neff*, 95 U.S. 714 [1878]); *Huling v. Kaw Valley Railway*, 130 U.S. 559, 564 (1889) (non-resident owner "cannot evade the duties and obligations [including tax obligations] which the law imposes on him in regard to [real] property by his absence from the State"). This policy underlies the jurisprudence that provides for relaxed means of obtaining personal jurisdiction in actions to clear clouds on title to property, including liens, as well as the local action rule.

Congress' recognition of the need to facilitate the courts' exercise of jurisdiction over rights in property, specifically including liens and suits involving clouds on title, is reflected in 28 U.S.C. § 1655, titled "Lien enforcement; absent defendants."[11] The immovable property exception codifies, with

[11] *See also Shaffer v. Heitner*, 433 U.S. at 207 (when "claims to the property itself are the source of the underlying controversy," as opposed to the property being merely the means to bring a defendant

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respect to foreign sovereigns, this same policy interest, *i.e.*, the United States' interest in controlling its own land. *See Asociacion de Reclamantes v. United Mexican States*, 735 F.2d at 1521.

Reclamantes, which discussed § 1605(a)(4) at length, noted that the policies underlying the local action rule were similar to those underlying this "traditional real property exception," and that the contours of the exception complemented the local action rule, which makes the local court the exclusive venue for actions involving real property. 735 F.2d at 1521-22. Under the local action rule, and contrary to the contention of the United States, actions to enforce liens, or to seek a declaration of their validity, are traditionally local, and must be heard where the property is located.[12]

Reclamantes suggests that if a case determining the validity of an interest in real property is subject to the local action rule, it also fits within the FSIA's immovable property exception. "The [local action rule], like [the exception to foreign sovereign immunity], is limited to questions that directly implicate interests in the property or rights to possession." 735 F.2d at 1522. Similar considerations underlie both rules: the fact that a sovereign has "a primeval interest in resolving all disputes over use or right to use of real property within its own domain," *id.* at 1521, and

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into court via a pre-judgment attachment in an unrelated dispute, minimum contacts required by due process will ordinarily be found to exist); 1 Moore's Federal Practice § 4.02 (3d ed. 2006).

[12] Actions to enforce: *e.g. Robertson v. Chinnow*, 68 N.W.2d 909, 911 (1955); *Edward Joy Co., Inc. v. McGuire & Bennett, Inc.*, 608 N.Y.S.2d 134 (N.Y. App. Div. 1993); *Merrill Realty Co., Inc. v. Harris*, 353 N.Y.S.2d 570 (N.Y. App. Div. 1974); *see also* 56 Am. Jur. Venue, § 11, 1954 Supp.; J. V. Dempsey, Lien as Estate or Interest in Land Within Venue Statute, 2 A.L.R. 2d 1261 (1948). Actions for declaration of validity: *e.g. Cavalier County v. Gestson*, 31 N.W.2d at 790; *Honoye Central School Dist. v. Berle*, 415 N.Y.S.2d 565 (N.Y.S. Ct. 1979); *McClatchie v. Rector, Church Wardens & Vestrymen*, 118 N.Y.S.2d 648 (N.Y. S. Ct. 1953).

the fact that "courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation." *Id.*[13] The two rules work together, "since the local action rule without the real property exception to sovereign immunity would mean that real property disputes involving foreign sovereigns could not be resolved in any court," *id.* at 1522, a result that would obtain if petitioners' contentions are accepted.[14]

4. *A Property Tax Lien is not a "Bootstrapping Device," Nor Does it Provide Jurisdiction Where None Would Otherwise Lie.*

Petitioners and the United States are mistaken in contending that these actions are tantamount to a prohibited pre-judgment attachment. Prior to enactment of the FSIA, there was no mechanism for obtaining personal jurisdiction over a foreign state, resulting in plaintiffs' frequent resort to the discredited practice of seizing and attaching property in order to obtain personal jurisdiction. House Report at 8, 1976 U.S.C.C.A.N. v.

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[13] Petitioners incorrectly assert that lien foreclosures do not implicate the complexities of local property law. The fact that before reaching the local law issues, the court must address the governing treaty law is true of any case involving foreign sovereign property. This does not mean that local law is not relevant to the merits of the dispute. It could just as well be argued that any dispute in real property, such as whether the plaintiff or the foreign sovereign has a right to possession, is "really" about the meaning of a state's particular laws governing property possession.

[14] *See also* S. Sucharitkul, Fifth Report on Jurisdictional Immunities of States and Their Property, 1983 I.L.C. Yearbook 46-48 (noting these same grounds as supporting the immovable property exception to foreign sovereign immunity). *United States v. Fox*, 94 U.S. 315 (1877), cited by the United States, actually supports the City, in that it holds that of necessity, "the disposition of immovable property . . . is exclusively subject to the government within whose jurisdiction the property is situated." *Id.* at 320. This is as true of liens as of any other matter affecting title to property.

5 at 6606. The FSIA prohibited this practice, while at the same time providing a mechanism for personal service on foreign states.[15]

The immovable property exception of § 1605(a)(4) gives the court subject matter jurisdiction over this dispute and § 1610 prevents attachment or execution of the property to satisfy the resulting judgment. It cannot be said, therefore, that this litigation uses "bootstrapping" liens that are, in fact, methods of attachment that would violate the proscription on attachment or execution contained at 28 U.S.C. § 1610. Here, the City has not attached petitioners' property and recognizes that it cannot do so even if it prevails. Applying the reasoning of the United States, any action to establish any interest in property — even one permitted under its interpretation of the immovable property exception — would amount to a seizure, because it would, if successful, encumber or even eliminate the foreign state's property rights.

It is wrong to argue, as the United States does, that if a lien is within the immovable property exception the result would be to create jurisdiction where none would otherwise lie, or permit an end-run around any provision of the FSIA. Pre-judgment liens are created by statute in situations where the local or state legislature has decided that the underlying obligations are so tied to the local governance of property that it is appropriate to enforce them through the creation of property interests in the form of liens. This is the case with property tax liens which, like some of the other liens enumerated dismissively by the United States, arise directly out of the ownership and use of property, or are for payment for specific services rendered to a property.[16]

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[15] Similarly, a year after the FSIA was enacted, *Shaffer v. Heitner*, 433 U.S. at 186, prohibited the analogous practice of attaching unrelated property to obtain personal jurisdiction.

[16] The Vienna Diplomatic and Consular Conventions (Art. 23 & Art. 32, respectively) specifically require that all diplomatic properties (Cont'd)

To the extent that the United States is suggesting that no state or local law can support jurisdiction under § 1605(a)(4), its argument goes too far. Property rights exist by virtue of state and local law. Mischaracterizing the lien as a "self-help measure," the United States suggests that a locality would enact legislation as a pretext to gain jurisdiction over a foreign state. This argument is both far-fetched and untrue. Rather, petitioners seek to escape the operation of provisions of law applicable to all realty in the jurisdiction.

B. UNDER THE RESTRICTIVE THEORY OF FOREIGN SOVEREIGN IMMUNITY CODIFIED BY THE FSIA, A PROPERTY TAX LIEN IS A RIGHT IN IMMOVABLE PROPERTY.

The FSIA was enacted to codify "the so-called 'restrictive' principle of sovereign immunity" as then recognized in international law. *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992); House Report at 7, U.S.C.C.A.N. at 6605. *See also Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d at 1517. International practice recognized a wide range of disputes in real property as giving rise to jurisdiction.

Under the restrictive theory of foreign sovereign immunity, a state is only immune from the jurisdiction of foreign courts "as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure*

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pay taxes that "represent payment for specific services rendered." In fact, the State Department has advised diplomatic missions that they are responsible for fees which relate to services to their property. "Typical examples of such services include utilities, water, sewerage and refuse collection. Such charges are stated separately on the tax bill and must be paid." Diplomatic Note HC-18-93 (JA 187). Yet petitioner India has refused to pay sidewalk and elevator charges, which are charges for specific services, and are included in the liens for which the City seeks a declaration of validity (JA74-75).

gestionis)." *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993); *Reclamantes*, 735 F.2d at 1520. A foreign sovereign that purchases and holds property abroad accepts from the host country and locality a panoply of protections and benefits in connection with that property ownership and, like any other property owner, takes upon itself a bundle of rights and obligations engendered by that ownership, as defined by local law. By acquiring immovable property, a foreign sovereign is said to enter into the sphere of private law, in which it enjoys no immunity. *See* M. Whiteman, 6 Digest Int'l L. § 22, 638-48 (U.S. Dept. of State 1968) (citing foreign law that applies restrictive theory to real property cases).

Long before the enactment of the FSIA in 1976 a broad immovable property exception had begun to be recognized in international law and practice.[17] As early as 1932, the Harvard Research Project on International Law conducted an exhaustive survey of then-current international practice, noted the general acceptance of the restrictive theory, and concluded that "[w]hen a State acquires immovables it must be deemed to effect such acquisition subject to the law in force at the *situs* of the property."

[17] The United States argues that even the absolute (as distinct from the restrictive) theory of foreign sovereign immunity recognized the immovable property exception, and therefore the United States' adoption of the restrictive theory is irrelevant in determining the scope of that exception. However, some, though not all, of the countries following the absolute theory rejected the immovable property exception as inconsistent with absolute immunity. *See, e.g., Reference re Tax on Foreign Legations*, 2 D.L.R. at 500 (Canada 1943); *Syquia v. Lopez* 1951 I.L.R. 228, 230-31 (No. 55) (S. Ct. of the Philippines 1949) in M. Whiteman, 6 *Digest of Int'l L.* at 644-45; *Robine v. Consul of Great Britain*, 1950 I.L.R. 140, 142-43 (Ct. of App. of Bordeaux, France 1950) in M. Whiteman, 6 *Digest of Int'l L.* at 646. In contrast, the growing number of States that accepted the restrictive view applied a broad immovable property exception, holding that "[b]y acquiring immovable property a foreign State enters into the sphere of private law." *Rep. of Latvia Case*, 1955 I.L.R. 230, 232 (Higher Ct. of App., Fed'l. Rep. of Germany 1955); *see also Claim Against Empire of Iran Case*, 38 I.L.R. 57, 65, 68, 80-81 (Fed'l Cont'l Ct., Fed'l. Rep. of Germany 1963).

Harvard Research in International Law, Draft Convention on the Competence of Courts in Regard to Foreign States, Art. 9, 26 Am. J. Int'l L., Supp. 455 at 574 (1932). The Harvard Draft Convention stated that a local court has jurisdiction over a foreign sovereign "when the proceeding relates to rights or interests in, or to the use of, immovable property." *Id.* at 473-74. *See also* C.C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945) (the exception includes actions to resolve "questions pertaining to . . . the adverse interests of individual claimants").

By 1962, the Restatement (Second) of the Foreign Relations Law of the United States concluded, at § 68, that "the immunity of a foreign state . . . does not extend to . . . (b) an action to obtain possession of *or establish a property interest in* immovable property located in the territory of the state exercising jurisdiction" (emphasis added). Comment d to § 68 further specifies that

> The immunity from jurisdiction of a foreign state does not extend to actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction. The rule stated in Clause (b) does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession.[18]

As *Reclamantes*, 735 F.2d at 1521, and the court below correctly concluded (Pet. App. 12, 446 F.3d at 372), both § 68

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[18] The Second Circuit noted, Pet. App. 12-13, 446 F.2d at 372, that "the illustrations to this comment make clear that it does not limit the types of interests that can be involved, but rather clarifies that those rights must actually be 'in issue.'" Among the international decisions relied upon by the Reporters of the Restatement (Second) is *Suit Against Hungary*, 1927-28 I.L.R. 174, 175 (Sup. Ct. Czechoslovakia 1928), in which the court enforced a judgment lien against the Hungarian legation in Prague. *See* Restatement (Second) § 68, rptr. Note 1.

of the Second Restatement and its comment d support the view that an action to declare the validity of a property tax lien is one "to establish a property interest in immovable property."[19]

The Restatement (Third) of the Foreign Relations Law of the United States, adopted in 1986, noted the growing acceptance of the restrictive view of immunity from the end of World War II to the enactment of the FSIA in 1976 and immediately thereafter. *See* House Report at 8-10, 1976 U.S.C.C.A.N. at 6606-08. The Restatement (Third), citing the FSIA, explicitly states that property tax claims are not barred by foreign sovereign immunity:

> Premises used for an embassy, consulate, or other diplomatic mission come under [the exception], so that controversies relating to rights of ownership, possession, occupation, or use, as well as controversies concerning payment of rent, *taxes*, and other fees concerning such premises are subject to adjudication in the local courts.

Restatement (Third) § 455, comment b (emphasis added).[20]

International conventions drafted around the time of the FSIA's adoption, while not binding on the United States, and not identically phrased, offer further evidence of the international practice the FSIA was intended to codify. The European Convention on State Immunity, May 16, 1972, CETS No. 74,

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[19] *See also* Sections 64 and 65 of the Restatement (Second) and comments d and f to § 65 (while foreign government property is immune from tax enforcement, it is not immune from taxation).

[20] Petitioners and the United States argue that the Restatement (Third) is not authoritative. The United States' position here is inconsistent with its own prior position in *City of Englewood*, where it relied on the then-current draft of the Restatement (Third) as supporting application of the immovable property exemption to an action for property taxes. U.S. *City of Englewood amicus* Br. at 10 n. 7. This Court has also cited the Restatement (Third) with approval. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 713-714 (2004).

which was drafted in 1972 and entered into force in 1976, just prior to the enactment of the FSIA, shows that by 1972 international practice recognized jurisdiction in the *situs* country over a wide range of disputes concerning rights in immovable property. Article 9 of that Convention states that no immunity is available if the proceedings relate to the foreign sovereign's "rights or interests in, or its use or possession of, immovable property," or "its obligations arising out of" them.[21]

Similarly, the immovable property exception in the United Nations Convention on Jurisdictional Immunities of States and Their Property, 44 I.L.M. 803 (2004), uses the same formulation. Although the U.N. Convention was not approved by the General Assembly until 2004, this provision was in virtually final form in 1983.[22] Both conventions emphasize that "[t]he expressions 'rights', 'use' and 'possession' must be interpreted broadly." *See* Explanatory Report to the European Convention at ¶ 44; I.L.C. Fifth Report at 51. A similar formulation is also found in the United Kingdom's State Immunity Act of 1978, 17 I.L.M. 1123, 1124 (1978) (§ 6[1] provides that "A State is not immune as respects proceedings relating to — [a] any interest of the State in, or its possession or use of, immoveable property in the

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[21] Signatories to that Convention are Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland, and the U.K. *See* Council of Europe, CETS 74, status, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp.

[22] When the U.N. Convention was approved in 2004, the United States supported it. While it expressed qualifications as to certain other provisions, it expressed no doubts concerning the immovable property exception, which it described as "widely recognized," and having "worked well." Statement by Eric Rosand, Deputy Legal Counselor, U.S. Mission to the United Nations, Oct. 25, 2004 (http://www.usunnewyork.usmission.gov/04_206.htm).

To date, the U.N. Convention has been signed by 28 countries, including India. *See* United Nations, Office of Treaty Affairs, Status of Multilateral Treaties Deposited With the United Nations (2007), http://untreaty.un.org.

United Kingdom; or [b] any obligation of the State arising out of its interest in, or its possession or use of, any such property").[23]

Petitioners' and the United States' suggestion that these conventions should be disregarded because they cover only private disputes is misleading. As stated in the Explanatory Reports, "[t]he exclusion of these matters from the field of application of the [European] Convention . . . means only that, since the provisions of the Convention may not be invoked, recourse must be had to general rules of law," such as the Vienna Conventions, which provide for taxation of the property at issue here. Explanatory Report to European Convention at p. 113-114, http://www.conventions.coe.int/Treaty/en/Treaties/Word/074.doc.

Further indicative of the international practice underlying the FSIA immovable property exception are the pre-FSIA decisions of numerous courts abroad that have exercised jurisdiction to adjudicate obligations similar to those at issue here.[24] Similarly, the Code of Civil Procedure of petitioner India,

[23] The Chairman of the Drafting Committee of the U.N. Convention stated that the issue of taxation was ultimately not addressed because it was "governed by existing rules of international law." 1991 I.L.C. Yearbook 84, ¶ 6. The United States' representative on the I.L.C. Drafting Committee opposed deleting an earlier provision in the Convention that would have provided explicitly for jurisdiction over matters involving taxation of foreign sovereigns, and agreed to the deletion only "provided it was made entirely clear . . . that the deletion did not in any way prejudge the question of State immunity in fiscal matters." Summary Records of the Meeting of the Forty-third Session, 1991 Yearbook of the I.L.C., v. 1, at 84.

[24] *See, e.g., Suit Against Hungary*, 1927-28 I.L.R. 174 at 175 (Czechoslovakia, 1928) (enforcing judgment lien against Hungarian legation in Prague) (cited in Restatement (Second) § 68, rptr. Note 1); *U.S. Government v. Bracale Bicchierai*, 65 I.L.R. 273, 274-75 (Ct. of Appeal of Naples, Italy 1968) (no immunity for action to cancel lease of U.S. Consul); *Hungarian Embassy Case*, 65 I.L.R. 110, 112 (Fed. S. Ct., Fed. Rep. of Ger. 1969) (no immunity, even from execution, in mortgage foreclosure action so long as functioning of diplomatic mission

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adopted in its present form in 1951, allows a private party, with the consent of the Central Government, to sue a foreign sovereign in the Indian courts "with reference to [immovable] property *or for money charged thereon.*" Code of Civ. Proc. § 86, *reproduced in* U.N. Leg. Series, v. VII, Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities (1958) (emphasis added).

As the United States argued in its *City of Englewood amicus* brief, at 10:

> The FSIA intended to codify this international law and practice and should be construed consistently with that law and practice. Accordingly, the [Third Circuit] panel should have interpreted the real property exception of section 1605(a)(4) to include actions for property taxes.

Prior to the enactment of the FSIA, no American court had definitively decided — one way or the other — whether it had jurisdiction to adjudicate immovable property cases brought against a foreign sovereign, because it was not until the enactment of the FSIA that the responsibility for making determinations concerning immunity from suit was transferred from the State Department to the courts (*see infra* at 31).

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not impaired; foreign sovereign's assumption of mortgage obligations held to be private law activities); *Restitution of Property (Rep. of Italy) Case*, 1951 I.L.R. 221, 222 (Ct. of App. of Hamm, Fed. Rep. of Ger. 1951) (immovable property exception supports jurisdiction over foreign state in action by private persons to obtain return of property transferred to state by "discriminatory legislation"); *Purchase of Embassy Staff Residence Case*, 65 I.L.R. 255, 257 (Trib. of First Instance, Athens, Greece 1967) (no immunity from jurisdiction with respect to purchase of real property used for housing U. S. embassy staff below rank of head of mission); *see also Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, 3 All E.R. 961 (Eng., Ct. of App. Civ. Div. 1975) (outlining exceptions to sovereign immunity, including cases "in respect of debts incurred here for services rendered to" property in forum).

Contrary to the United States' explanation, the two United States cases in which the question of jurisdiction to adjudicate tax issues arose prior to enactment of the FSIA, *City of New Rochelle v. Republic of Ghana*, 255 N.Y.S.2d 178 (N.Y. County Ct. 1964), and *Knockling Corp. v. Kingdom of Afghanistan*, 167 N.Y.S.2d 285 (N.Y. County Ct. 1957), are not cases which rejected suits involving property tax liens "as barred by sovereign immunity." Instead, the courts there acceded to the Department of State's Recognitions of Immunity in the properties, as they were required to do by the then-obtaining judicial doctrine directing acquiescence to such Recognitions. *See United States of Mexico v. Schmuck*, 62 N.E.2d 64 (N.Y. 1944). Indeed, the court in *City of New Rochelle* stated that, but for the requirement that it comply with the State Department's Recognition of Immunity, with which it complied "most reluctantly," it was "of the opinion that it ha[d] jurisdiction of the real property at issue." 225 N.Y.S. 2d at 179. Nor is the pre-FSIA case of *Republic of Argentina v. City of New York*, 250 N.E.2d at 698, instructive on the question of jurisdiction, since that case was instituted by the foreign sovereign.

C. THE CASE LAW INTERPRETING 28 U.S.C. § 1605(a)(4) SUPPORTS A FINDING OF JURISDICTION HERE.

Apart from the decisions below, only *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d at 1517, contains a careful analysis of the parameters of the FSIA's immovable property exception. That decision supports the City's position.

Plaintiffs in *Reclamantes* were Mexican nationals who sued their own government for compensation promised them in a 1941 treaty between Mexico and the United States, which treaty extinguished the claims of claimants' predecessors in interest to real property lost to the United States following the Mexican-American War. The *Reclamantes* court held that because claimants' compensation claims were only derivative of ancient

property claims they were not "rights in immovable property" that were then in issue. 735 F.2d at 1523.

In seeking "to determine what Congress meant by the language [of the immovable property exception]," the court in *Reclamantes*, citing the House Report, wrote (735 F.2d at 1521-22):

> That § 1605(a)(4), like the traditional real property exception it was intended to codify, is limited to disputes directly implicating property interests or rights to possession is consistent with the examples of its application mentioned in the House Report and cited by appellants: suits involving "questions of ownership, rent, servitudes."

"Also consistent" with the House Report, *Reclamantes* said, was *County Board v. German Democratic Republic*, Civil No. 78-293-A, reprinted at 17 I.L.M. 1404 (E.D. Va. Sept. 6, 1978), in which the court found jurisdiction to adjudicate a dispute over property tax liens on diplomatic staff housing, which is exactly the issue before this Court. *Reclamantes*, 735 F.2d at 1522.[25]

The Court also found support for its opinion in both the local action rule and in § 68 of the Restatement (Second), which

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[25] In *County Board*, a county taxing authority in the United States sued a foreign sovereign seeking a declaration that its tax liens on diplomatic staff housing were valid. The District Court found that it had jurisdiction under § 1604(a)(4). After the District Court's decision in *County Board*, the United States filed an action seeking a declaratory judgment that the property was exempt from the county tax, which action did not present any jurisdictional issue under the FSIA. *United States v. County of Arlington*, 669 F.2d 925, 928 (4th Cir. 1982), *cert. denied sub nom. County of Arlington v. United States*, 459 U.S. 801 (1982), *appeal after remand sub nom. United States v. County of Arlington*, 702 F.2d 485 (4th Cir. 1983). The Fourth Circuit there held that the subject tax assessments were invalid. This holding is consistent with the particular rule applicable to diplomatic properties in the District of Columbia metropolitan area only. *See supra* at p. 3 n. 2.

"declined to extend the immunity of a foreign sovereign to 'an action to . . . establish a property interest in immovable property.'" It also cited both comment d to § 68, and the then-current draft of § 455(1)(c) and comment b to that section, in what was to become the Restatement (Third). *Id.* at 1521.

Subsequent decisions have relied exclusively on the analysis of *Reclamantes,* although not always interpreting the decision correctly. In *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d at 31, a case the court below found "unpersuasive," Pet. App. 21 n. 15, 446 F.3d at 376 n. 14, the Third Circuit reiterated *Reclamantes*' statement that "§ 1605(a)(4), like the traditional real property exception it was intended to codify, is limited to disputes directly implicating property interests or rights to possession," and then conclusorily stated: "[N]o one disputes Libya's title to the Englewood premises or its right to exclude others from possession thereof. Thus § 1605(a)(4) does not apply." *City of Englewood*, 773 F.2d at 36. *City of Englewood* undertook no analysis beyond what it borrowed from *Reclamantes*.[26]

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[26] As acknowledged by the United States, the United States filed an *amicus* brief in *City of Englewood* in support of plaintiff's motion to reargue and of the exercise of jurisdiction under the immovable property exception. The United States now incorrectly explains that the United States' brief then "did not examine pre-FSIA practice" and that it was "premised upon the mistaken understanding that the real property exception in the European Convention . . . would permit such claims" (U.S. Br. at 19 n.15). But in its *City of Englewood* brief the United States: argued (at pp. 5 to 7) that a proper reading of § 1605(a)(4), its legislative history and the decision in *Reclamantes* all supported the exercise of jurisdiction; argued (at pp. 8 to 10) that general principles of international law provide an exception from sovereign immunity to actions to assess taxes, including references to the laws of Portugal and Trinidad and Tobago and the draft Inter-American Convention on the Jurisdictional Immunities of States, in addition to the European and draft United Nations Conventions; and argued (at pp. 10 to 14) that "as a matter of property law, disputes which involve tax liens involve rights in immovable property," including citations to New Jersey statutes and

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Other cases interpreting the immovable property exception are consistent with *Reclamantes* and with other law that defines the contours of the exception. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987), while saying that the immovable property exception was "not intended broadly to abrogate immunity for any action touching upon real estate," was a neighborhood association's suit for damages allegedly caused by a diplomat's use of property in violation of a zoning ordinance. Plaintiff there was "obviously not seeking to establish any rights in [the property, nor did it make any] claim to any interest in that property." *Id.* As the court there correctly pointed out, the complaint "sounds not in the law of real property at all, but the law of nuisance." *Id.*

Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002), is also consistent with *Reclamantes* and with the City's position here. *Fagot Rodriguez* was an action for nonpayment of rent upon real property located in Puerto Rico that was used to house a foreign consulate. Shortly after institution of the suit, which originally sought eviction in addition to back rent and monetary damages for trespass, Costa Rica vacated the premises, and the Court was called upon to determine what had become "a simple contract dispute over nonpayment of rent — without more." 297 F.3d at 12. The proceedings at bar, on the other hand, do not seek money damages arising from an essentially contractual dispute concerning the use of property, but rather the judicial recognition

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case law dating to the 1920s, New York case law, real property, taxation and eminent domain treatises, and the Uniform Commercial Code. The United States concluded in that brief (at p. 3) that "Congress never intended that the principle of sovereign immunity should permit foreign governments to ignore their obligations to state and local communities," and that a denial of jurisdiction "will undermine the efforts of the United States both to ensure that foreign governments do not abuse the privileges and immunities to which they are entitled . . . , and to promote the interests of the United States abroad."

of a lien upon the real property itself, which lien would encumber the property's title.

By contrast, in *York River House v. Pakistan Mission to the U.N.*, 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y. 1991), then - District Judge Leval concluded that the immovable property exception did apply. *York River House* concerned whether, under New York's Rent Stabilization Law, a lessor was entitled to terminate a lease and regain possession of a property leased by Pakistan's Mission to the United Nations. The exception applied, moreover, even though, as in this case, the lessor could not obtain an order of eviction because the occupant enjoyed immunity from execution under the Vienna Convention on Diplomatic Relations. *York River House v. Pakistan Mission*, 820 F. Supp. 760 (S.D.N.Y. 1993).

D. THE OVERALL PURPOSE OF THE FSIA REQUIRES THAT THE ISSUES RAISED BY THESE PROCEEDINGS BE DECIDED BY THE JUDICIARY AND NOT BY THE STATE DEPARTMENT.

In enacting the FSIA, Congress determined that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth" in the statute. 28 U.S.C. § 1602. *See also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("Congress passed the Foreign Sovereign Immunities Act in order to free the Government from . . . case-by-case diplomatic pressures [and] to clarify the governing standards"). *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 760 (1998) noted "difficulties in implementing the principle" of restrictive sovereign immunity "through predominantly diplomatic means." In accordance with this express purpose of Congress in enacting the FSIA, the question of jurisdiction presented here should be decided as a straightforward question of law, and not be subjected to the vagaries of international diplomacy.

The State Department's actions in this case manifest precisely the impact of changeable diplomatic interests and pressures the FSIA was enacted to remove from the jurisdictional determination. As noted, in *City of Englewood*, the United States took the position that litigation concerning the validity of property tax liens comes within the immovable property exception and belongs in the courts. It now takes the opposite view, arguing that this dispute is "appropriately resolved through diplomatic means, rather than litigation in the courts of one state or the other" (U.S. Br. at 24 n.19). In addition, for more than half a century, and certainly since adoption of the Vienna Convention in 1969, the United States has expressed the view that properties like those at issue here are taxable (*see infra* at pp. 32-36).

The United States' views on the statutory interpretation question presented here are not entitled to any special deference. *See Republic of Austria v. Altmann*, 541 U.S. at 691 (United States' views on such statutory construction issues "are of considerable interest to the Court" but "they merit no special deference" in absence of reasons pertaining to a "particular" petitioner); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). *See also, Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties and executive agreements, and . . . interpreting congressional legislation is a recurring and accepted task for the federal courts").

E. THE VIENNA CONVENTION AND PRACTICE BOTH BEFORE AND AFTER ITS ADOPTION SUPPORT BOTH THE CITY'S CLAIM ON THE MERITS AND A FINDING OF JURISDICTION HERE.

In support of their argument that petitioners enjoy jurisdictional immunity, petitioners and the United States repeatedly cite the Vienna Convention and other authorities that address the merits, *i.e.*, whether staff housing is exempt from taxation. They argue that jurisdiction should not be found because the City's claim allegedly has no merit. They also argue that because the Vienna Convention would allegedly exempt a diplomatic agent from jurisdiction in a case such as this, and because the legislative history supports reading the FSIA "consistently with" the Vienna Convention, the FSIA should also be interpreted as exempting foreign sovereigns from jurisdiction here. These contentions are wrong.

1. The Vienna Convention and Other Pre-FSIA Authorities Show That the Properties At Issue Here Are Taxable.

For over half a century, the United States has repeatedly taken the position that foreign government properties such as those at issue here are subject to local taxation. In 1952, at about the same time as the Tate Letter signaling the United States' adoption of the restrictive view of foreign sovereignty,[27] the State Department advised the City that even cultural diplomatic offices maintained by France were taxable if State law so provided.[28]

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[27] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-715 (1976).

[28] Letter from the Secretary of State to the City of New York, contained in the Record on Appeal (p. 58) in *Republic of Argentina v. City of New York*, 250 N.E.2d at 698.

In a 1955 Note, the State Department informed foreign governments that "the taxation of real property owned by foreign governments and used for consular purposes in the various states is a local matter . . . ." *Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities*, U.N. Leg. Series v. VII (1958).[29]

This position was fully consistent with international and United States practice at the time and earlier.[30] Eileen Denza, relied on by the United States here, writes that "prior to the Vienna Convention, state practice on the imposition of national

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[29] Decades earlier, in 1925, a New York State trial court held that the French government had to pay real property taxes on property it owned in Brooklyn. An order to pay taxes, the court reasoned,

> constitutes no interference with the sovereign use of such property . . . The privilege of immunity [of diplomatic agents] carries with it an exemption from taxation of the personalty of an ambassador and the property belonging to him, or . . . his sovereign, and applies to the premises occupied by him as his residence for the purpose of transacting his governmental business, but the exemption to ambassadors or to foreign states does not seem to have been extended beyond such privileges.

Republic of France v. City of New York, 74 N.Y.L.J. 1279, Dec. 30, 1925 (N.Y. Sup. Ct. 1925). The United States' speculation that this decision turned on the fact the property in question was owned by a corporation that was in turn owned by France finds no support in the decision.

[30] *See also Gobierno de Italia v. Consejo Nacional de Educacion*, 1941-1942 Ann. Dig. 196, 198 (Camera Civil de la Capital, Argentina 1940) (tax exemption is a courtesy; no exemption for land taxes); Decree No. 615 of 6 April 1935 to Define the Privileges and Immunities of Foreign Diplomatic Agents (Colombia) (no property tax exemption except for mission property); Rules of the Federal Political Dept. on Diplomatic and Consular Privileges (Switzerland, 1956) (diplomatic immunity from taxation does not extend to real property taxes) (the last two citations *reproduced in* 7 U.N. Legislative Series at 66, 308).

and local taxes on premises of a diplomatic mission was variable, and where exemption from liability was granted, it was based on courtesy, on general usage, or on reciprocity rather than on binding custom." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* at 149 (2d ed. 1998). *A fortiori*, staff housing, which is not deemed diplomatic premises, has not been thought to be exempt from local property taxation.[31]

As the City would demonstrate at a hearing on the merits, Article 23 of the Vienna Convention, in force 1972,[32] actually provides for taxation of staff housing, since it exempts from taxation only the "premises of the mission." "Premises of the mission" are defined as the "buildings or parts of buildings . . . used for the purposes of the mission *including the residence of the head of the mission*." 23 U.S.T. 3227, Art. 1(i) (emphasis added). If "premises" had been intended to include staff housing, the convention drafters would not have singled out the residence of the head of mission for tax exemption.[33]

That the foregoing interpretation is correct, and reflects the United States' understanding of the Vienna Convention, is shown by the State Department's consistent post-Vienna Convention

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[31] *Republic of Argentina v. City of New York*, 250 N.E.2d at 698 concerned the tax status of consular offices, and not staff housing. *Id.* at 701.

[32] Article 23 provides: "(1) The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered."

[33] A United Kingdom court, interpreting this same Vienna Convention language, has held that because staff housing is neither mission premises nor used for mission purposes, it had jurisdiction over a rent dispute between a private landlord and France. *See Intpro Properties (U.K.) Ltd. v. Sauvel*, QB 1019 (Queen's Bench, United

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advice to the diplomatic community and taxing authorities, reviewed *supra* at pp. 1-3, that the Vienna Convention permits local property taxation of staff housing. In fact, the State Department's present website, after explicitly citing the Vienna Convention, advises that diplomatic staff housing is not exempt from local property taxation outside the Washington, D.C. metropolitan area (JA177). The present State Department "FAQ" concerning Real Property, Taxation and Parking is to the same effect.[34]

Thus the argument that petitioners are immune from jurisdiction because they are allegedly immune from taxation is incorrect.[35]

(Cont'd)
Kingdom 1983) (citing E. Denza, *Diplomatic Law*). *See also City of Englewood*, 773 F.2d at 31 (*amicus* brief of the United States argued that certain Libyan diplomatic property was subject to taxation and certain liens were valid).

[34] The Ambassador's residence and the residence of the head of a consular post are exempt [from property taxation] on the basis of international law. In addition, subject to reciprocal treatment of comparable property belonging to the U.S., other diplomatic staff residences may also be granted exemption. *Absent bilateral agreement, consular staff and residences are not exempt.*

U.S. Dept. of State, Real Property, Taxation & Parking FAQ, http://www.state.gov/ ofm/resource/30294.htm (emphasis added).

[35] In support of their position on the merits, petitioners also cite *Reference re Tax on Foreign Legations*, 2 D.L.R. 481 (Canada 1943), an opinion on reference from the Government of Canada which raised no jurisdictional question. By a 3 to 2 decision, it declared illegal under Ontario law the then-existing practice whereby localities taxed the legations of various foreign countries. The dissenting judges took the position that the taxes could be imposed even though the resulting liens could not be enforced. *Id.* at 508, 516. Ontario at that time accepted and
(Cont'd)

2. *The Vienna Convention Does Not Provide For Jurisdictional Immunity to Diplomatic Agents, Much Less to Foreign Sovereigns, In a Case Concerning Staff Housing.*

Petitioners and the United States argue that Article 31 of the Vienna Convention requires that the FSIA's immovable property exception be interpreted to exclude jurisdiction here. Article 31 provides that a

> diplomatic agent . . . shall enjoy immunity from . . . civil and administrative jurisdiction, except in . . . a real action relating to private immovable property . . . , unless he holds it on behalf of the sending State for the purposes of the mission.[36]

This provision allegedly immunizes foreign sovereigns from jurisdiction because (1) this is not "a real action;" (2) staff housing owned by a diplomatic agent would be immune from jurisdiction under this provision; and (3) it therefore follows that such housing, when held by the foreign sovereign itself, must also be immune from jurisdiction. They are wrong on each of these points.[37]

(Cont'd)

adopted the law of England as its own, *id.* at 484, 501, and England at that time followed the most absolute principle of foreign sovereign immunity, *id.* at 512 (dissent of Hudson, J.) ("in England the widest views as to diplomatic immunity are adopted"). Therefore, this decision is no longer authoritative, even in Canada, and cannot bear on the interpretation of the FSIA, which codified the restrictive view of foreign sovereign immunity. *See* Fifth I.L.C. Report at 48-49, ¶¶ 118-123 (noting shift in England from strict, absolute view of foreign sovereign immunity to restrictive view).

[36] Articles 34 and 37, also cited by petitioners, add nothing to the analysis. Article 34 exempts the diplomatic agent from taxes under the same circumstances as described in Article 31. Article 37 extends some or all of the immunities previously described to various categories of diplomatic staff and their families.

[37] Contrary to the assertions of petitioners and the United States, (Cont'd)

First, this is a real action within the meaning of Art. 31. The concept of real action in its contemporary use comes from civil law. Under Louisiana law, for example, a real action is the equivalent of a local action that must be brought where the property is located. *Weeks, Kavanaugh & Rendeiro v. Blake*, 2001 U.S. Dist. LEXIS 10386, at 12 (E.D. La. July 17, 2001) ("real actions" are actions involving enforcement of rights in real property. "[A]n action for enforcement . . . of a mortgage clearly is a real action, which is entirely local, not transitory, in nature."); *Chateau Lafayette Apts, Inc. v. Meadow Brook Nat'l Bank*, 416 F.2d 301, 304 (5th Cir. 1969). *See also* E. Denza, *Diplomatic Law* at 238 (real action is one in which title or possession is in issue).

Second, staff housing is not covered by Article 31. That article only denies jurisdiction in a "real action relating to private immovable property" in one limited instance: when the diplomatic agent holds the property for use as a diplomatic mission because local law prohibits foreign sovereigns from owning property in their own names. In that instance, which is not the case here, the nominal owner of the legation property has to be the diplomatic agent rather than the foreign nation itself. 1957 I.L.C. Yearbook 94-95 (402nd Meeting, May 22, 1957); *see also* Denza, *Diplomatic Law* at 243 (provision covers cases where mission premises as a matter of form and in accordance with local law were held in the name of the head of mission).[38]

(Cont'd)

United States courts have found that they had jurisdiction in tax cases against foreign sovereigns, both before and after enactment of the FSIA. *See City of New Rochelle*, 255 N.Y.S. 2d at 178, *County Bd. of Arlington*, 17 I.L.M. 1404. In 1985, the United States urged this position – diametrically opposed to its present position – on the Third Circuit in its *amicus* brief in support of reargument in *City of Englewood*, 773 F.2d 31.

[38] *See Deputy Registrar Case*, 94 I.L.R. 308, 312 (District Court of the Hague, The Netherlands 1980) (under Vienna Convention Art.

(Cont'd)

Third, the jurisdictional immunities applicable to diplomatic agents under the Vienna Convention are different from those applicable to foreign sovereigns under the FSIA. *See* S. Sucharitkul, *Immunities of Foreign States Before National Authorities*, 97, in 1976 Recueil des Cours (Collected Courses of the Hague Academy of International Law, 1976) ("immunities of ambassadors are regulated by a different set of principles of international law from that applicable to State immunity"). Indeed, the Vienna Convention, while guaranteeing jurisdictional immunities for diplomatic agents, provides, with respect to foreign sovereigns, only that "the premises of the mission . . . shall be immune from . . . attachment or execution" (Vienna Convention, Art. 23[3]).

Accepting the argument of petitioners and the United States that Article 31 of the Vienna Convention should be imported into the FSIA would deprive local courts of jurisdiction even over a dispute that alleged that title was in the claimant rather than in the foreign sovereign. Moreover, there would be no FSIA jurisdiction to entertain a suit against a foreign sovereign by a contractor who had done work on an embassy building and who was not paid. Yet such a suit is expressly mentioned by the House Report as allowable under the commercial activity exception. H.R. Rep. No. 94-1487, at 16 (1976), 1976 U.S.C.C.A.N., v. 5, at 6615.[39]

(Cont'd)
31(1)(a), jurisdictional immunity does not apply to staff housing, but only to situation in which "the sending State [must] acquire the immovable property required for the mission in the name of the head of the mission"); *see also Intpro Properties (U.K.) Ltd. v. Sauvel*, QB 1019 (United Kingdom 1983) (interpreting Vienna Convention and finding no jurisdictional immunity for staff housing owned by France).

[39] A suit brought under these very facts was also allowed by the Federal Constitutional Court of Germany, which explicitly rejected the argument that Article 31 of the Vienna Convention, which applies to diplomatic agents, could be applied *pari passu* to foreign sovereigns. *Claim against the Empire of Iran Case*, 38 I.L.R. at 57 (Germany, 1963) (noting that "the extent of State immunity cannot be determined from that of diplomatic immunity").

The Vienna Convention does not directly address the jurisdictional immunity of foreign states for claims concerning immovable property. However, the inclusion of a specific provision that prohibits the attachment or execution of mission premises (Vienna Convention Art. 22[3]) strongly suggests that local jurisdiction would apply even to actions concerning rights in such property.[40] The FSIA immovable property exception is consistent with the Vienna Convention on this point, as stated in the House Report:

> It does not matter whether a particular piece of property is used for commercial or public purposes. It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property.

H.R. Rep. No. 94-1487, at 20, 1976 U.S.C.C.A.N., v. 5, at 6619. Thus, even if petitioners were correct that the portions of their property at issue here qualified as mission premises — and they are not — that fact alone could not control the jurisdictional analysis under the FSIA.

F. A DECLARATION OF THE VALIDITY OF THE TAX LIENS HAS MAJOR PRACTICAL SIGNIFICANCE.

As noted, and contrary to petitioners' repeated assertions, this declaratory judgment action is not an action to "enforce" a

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[40] Interpreting the Vienna Convention, courts of other nations have held that there is no immunity even for claims concerning mission premises as long as they stop short of attachment or execution. *See Jurisdiction Over Yugoslav Military Mission (Germany) Case*, 38 I.L.R. 162, 165-170 (Fed. Const'l Ct., Fed. Rep. of Ger. 1962) (Vienna Convention provides limited immunity to diplomatic mission premises; court may exercise jurisdiction over title dispute concerning diplomatic mission itself, but execution is prohibited); E. Denza, *Diplomatic Law* at 129.

tax lien or to "compel the payment of a tax."[41] Petitioners and the United States argue that Congress could not have intended to grant the courts jurisdiction to consider the City's claim because §§ 1609 and 1610 of the FSIA prohibit enforcement of any judgment that may be rendered here, so that any resulting judgment would be meaningless. But the very structure of the FSIA, which creates broader jurisdiction to adjudicate than to enforce, *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d 240, 256 (5th Cir. 2002); *De Letelier v. The Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984), contemplates that judgments may be rendered that are not enforceable.

In fact, the FSIA contains no immovable property exception to immunity from enforcement, *see* 28 U.S.C. § 1610, so that any adjudication under the immovable property exception will necessarily be unenforceable, no matter how directly it concerns title, ownership, or possession. Therefore, if the question of whether a claim puts in issue a right in property turned on the enforceability of that very right against a foreign sovereign, the immovable property exception would be rendered a nullity. This is, however, not the case. *See, e.g., York River House v. Pakistan Mission to the U.N.*, 1991 U.S. Dist. LEXIS at 13683; *York River House v. Pakistan Mission*, 820 F. Supp. at 760 (§ 1605(a)(4) jurisdiction accorded over action to terminate the lease of United Nations mission although Vienna Convention prevented eviction).

It is commonplace in international law to distinguish between adjudication and enforcement. *See* Restatement (Third) §§ 401 (distinguishing jurisdiction to adjudicate from

[41] Therefore, petitioners' assertion that the U.S.'s *amicus* brief in *Republic of Argentina*, 25 N.Y.2d 252, stated that a host government could not "compel the payment of a tax" through a judicial proceeding against a foreign sovereign's property is irrelevant (Pet. Br. at 31). Moreover, the quote actually comes from the decision itself, *see Republic of Argentina*, 25 N.Y.2d at 262, and is not to be found in the U.S.'s *amicus* brief.

jurisdiction to enforce), 431 (jurisdiction to enforce), 463 (jurisdiction to enforce and foreign sovereign immunity). This is by no means futile, because it is presumed that a foreign state will honor its obligation to pay a judgment. *See* Testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice, in support of legislation that became the FSIA, before the House Committee on the Judiciary, Subcommittee on Claims and Governmental Relations, Hearing on H.R. 3493 (June 7, 1973), at 24; *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d at 252. *See also* S. Sucharitkul, *Immunities of Foreign States before National Authorities* at 121 (to argue that judgments without implementation are meaningless is to disregard the moral authority attaching to a decision rendered by an impartial tribunal). Moreover, as the United States concedes, in "the United States' experience, when taxes are assessed against properties that are indisputably subject to taxation, foreign governments generally pay those taxes" (U.S. Br. at 24 n. 19). What these cases seek is to make clear that the petitioners' properties are, in fact, "indisputably subject to taxation."

The inability to execute immediately upon a judgment here does not make determination of the City's rights in the immovable property a futile or meaningless exercise. Not only do foreign sovereigns generally pay court judgments, as well as validly assessed taxes, but even if a foreign sovereign were to disregard the lawful judgment of a United States court, a judgment declaring the lien's validity could nevertheless be enforced against a subsequent purchaser. *See United States v. Alabama*, 313 U.S. at 281-82 (declaring validity of tax liens on property owned by United States).

Moreover, Congress has acted to make it likely that a judgment in this case would be paid by any country that receives United States foreign aid. By statute, a judgment declaring the validity of the lien would result in the withholding from foreign aid of 110 percent of the unpaid taxes "as determined in a court order or judgment entered against such country by a court of

the United States." Consolidated Appropriations Act of 2005, Public Law 108-447, § 543(1) (2004); Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2006). As the Court of Appeals, referring to these Congressional Acts, noted, finding no jurisdiction to determine the validity of property tax liens and the underlying tax liability of foreign governments is "difficult to square with Congress's explicit reliance on the courts to adjudicate" those liabilities. Pet. App. 11, 446 F.3d at 371.

The statutory construction urged by petitioners would render these enactments ineffectual. *See Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *affd. sub nom. Reagan v. Abourezk*, 484 U.S. 1 (1987); 2A N. Singer, Sutherland Statutory Construction § 46.06 (4th ed. 1984). Wherever possible, Congressional enactments should be harmonized and reconciled. *Clark v. Uebersee Finanz-Korporation, A. G.*, 332 U.S. 480 (1947); *Pittsburgh & L. E. R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). In presuming harmony between enactments, "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

II. THE FSIA'S COMMERCIAL ACTIVITY EXCEPTION PROVIDES AN ADDITIONAL BASIS FOR JURISDICTION.

28 U.S.C. § 1605(a)(2) exempts from foreign sovereign immunity those actions that are "based upon a commercial activity carried on in the United States by the foreign state." Although the courts below did not address this jurisdictional provision, at every stage the City has argued it is applicable here. The exception provides an additional jurisdictional basis for this suit.

28 U.S.C. § 1603(d) explains that "[t]he commercial character of an activity shall be determined by reference to the

nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." Activities undertaken by foreign governments in the United States, including the use of real property, therefore may afford the basis for suit in American courts if they are the same sorts of activities in which private actors might engage, when the foreign government, regardless of its purpose, "acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover*, 504 U.S. at 614. *See also Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. at 698-705; *Saudi Arabia v. Nelson*, 507 U.S. at 360.

The House Report on the FSIA explains that "the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature," and not extend to every act that serves a governmental objective. House Report at 14, 1976 U.S.C.C.A.N. at 6613. A state engages in "commercial activity" "where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns,' such as regulation, legislation, expulsion of an alien, control over national resources or denial of justice." *Saudi Arabia v. Nelson*, 507 U.S. at 360.

Courts have routinely exercised jurisdiction over the activities of diplomatic and consular missions where, as here, the activities are of the type in which private commercial actors engage. *See, e.g., Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980) (holding embassy bank account used for "'maintenance and support of the Embassy and its personnel'" to have been "used for a commercial activity," within the meaning of the FSIA). *See also* House Report at 14, citing a foreign government's "leasing of its property" as an example of a commercial activity that would fall within the statutory definition.

Closely on point is *Joseph v. Office of the Consulate*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied sub nom. Consulate*

General v. Joseph, 485 U.S. 905 (1988), where the Ninth Circuit held that a consulate's rental of a residence for its employees was a commercial transaction that afforded jurisdiction in a landlord-tenant dispute, "although the lease agreement at issue was not undertaken by the Consulate for profit." *Id.* at 1024.

Providing staff housing to petitioners' employees presents the same kind of commercial activity as *Joseph*. Both involve the providing of residences for consular or mission employees. Neither the selection of the housing nor the terms and conditions of employment, nor the perquisites of an employee's position, are issues of relevance in these actions. Petitioners' provision of housing to employees is not an activity that only a sovereign state can perform; rather, it is an activity that business corporations and private not-for-profit organizations can, and frequently do, undertake.[42]

Even if petitioners' decisions to house staff within buildings that also house the mission offices, rather than to rent space for their employees in the private housing market, were motivated by safety considerations or the need to address diplomatic inquiries twenty-four hours a day, *see* JA at 153, rather than just economic concerns, that fact would not change the nature of the activity. Instead, such concerns pertain only to the underlying purpose that has been repeatedly held irrelevant to the jurisdictional question. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000), cited by petitioners, is not to the contrary,

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[42] Logging companies and oil drilling companies, for example, also house their employees on site. The Internal Revenue Code devotes an entire section to the tax treatment of housing provided by organizations to their employees. *See* 26 U.S.C. §119(a)(2). *See, e.g., Rowan v. United States*, 452 U.S. 247 (1981) (lodging provided to employees working on offshore oil rigs); *Adams v. United States*, 585 F.2d 1060 (Ct. Cl. 1978) (housing provided by Tokyo-based corporation to American, foreign-based employees). Petitioners' activities are also similar to those undertaken by private landlords who provide housing in exchange for value, rent, or services rendered.

since that case concerned instead "a foreign state's exercise of the power of its police, [which] has long been understood . . . as peculiarly sovereign in nature." *Id.* at 464.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS AND THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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Ormsby v. Ottman, 85 F. 492 (8th Cir. 1898) 3

Pasquantino v. United States, 544 U.S. 349 (2005) 3

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L-C Security Serv. Corp. v. State of New York, 434 N.Y.S.2d 883 (N.Y. Ct. Cl. 1980) 2

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Weinstein v. Taylor, 234 N.Y.S.2d 926 (N.Y. Sup. Ct. 1962), *aff'd mem.*, 242 N.Y.S.2d 707 (N.Y. App. Div. 1963) 2

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Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. (1973) 9

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 94th Cong. (1976) 19

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51 Am. Jur. 2d, Liens § 2 (2003) 1

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75 N.Y. Jur. 2d, Liens § 5 (2000) 1

Black's Law Dictionary (4th ed. 1951) 1, 2

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Draft Convention on the Competence of Courts in Regard to Foreign States, 26 Am J. Int'l Law. Sup. 455 (1932) 8, 9, 10

Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1256 (2006) 11

Restatement (First) of the Law of Property (1944) 4

Restatement (Second) of Foreign Relations Law (1965) 8, 9, 10, 13

Richard Pugh & Joseph McLaughlin, Jurisdictional Immunities of Foreign States, 41 N.Y.U. L. Rev. 25, 27 (1966) 9, 11

U.S. Department of State, Diplomatic Note Sent from the U.S. Department of State to Sweden Concerning Exemption from Real Property Taxes (July 18, 2001) *at* http://www.state.gov/s/l/22686.htm 18

U.S. Department of State, Letter to New York Department of Finance concerning Libyan Mission Tax Lien (Apr. 9, 2002) *at* http://www.state.gov/s/l/38710.htm 18

REPLY BRIEF

I. Actions to Declare the Validity of Tax Liens Do Not Put Rights in Immovable Property in Issue.

The City of New York ("the City") argues that its lawsuits fit within the plain text of 28 U.S.C. § 1605(a)(4) because a "property tax lien is a right that the lien holder has in the property of the fee owner." Brief for Respondent ("Resp. Br.") at 8. This argument was rejected by the Second Circuit. Pet. App. at 21. It is unsupported by the authorities cited by the City. And, if adopted by this Court, it would allow local governments to abrogate sovereign immunity for any claim merely by passing a statute automatically converting the claim into a lien.

A. A Lien Is Not a Right in Immovable Property.

The authorities cited by the City do not support its argument that liens were defined as rights in immovable property when Congress enacted 28 U.S.C. § 1605(a)(4) in 1976. The City cites to Section 1 of a chapter in American Jurisprudence for the proposition that a lien is a "qualified right of property" (Resp. Br. at 8 n.4), but it ignores Section 2 of the same chapter, entitled "Nature of the right or interest," which states: "However, it has also been held that a lien is not a property right or proprietary interest in land or an estate in land and that it confers no ownership interest or general right of property or title upon the holder. . . ." 51 Am. Jur. 2d, Liens § 2 (2003); *see also* 75 N.Y. Jur. 2d, Liens § 5 (2000) (a lien "confers no general right of property upon the holder"). Similarly, the City quotes from a 1999 version of Black's Law Dictionary to argue that a lien is a property interest (Resp. Br. at 8) without disclosing that Black's stated in 1976 that a lien

"is not a property in or right to the thing itself." Black's Law Dictionary 1072 (4th ed. 1951).[1]

Contemporaneous New York decisional law confirms that liens were not considered "rights in immovable property" when Congress enacted the FSIA, and are not considered rights in immovable property today. The City does not deny that before 1976, New York's courts had held that a "lien was not a claim to 'an estate or interest in the real property.'" *Weinstein v. Taylor*, 234 N.Y.S.2d 926, 929 (N.Y. Sup. Ct. 1962), *aff'd mem.*, 242 N.Y.S.2d 707 (N.Y. App. Div. 1963); *see also Stickler v. Ryan*, 61 N.Y.S.2d 708, 709 (N.Y. App. Div. 1946) (mortgage lien does not "create any estate or interest in real property. It is a mere chose in action, held as collateral security for the payment of a debt."). Instead, the City points out that a 1977 statute amended New York law on a jurisdictional issue decided in *Weinstein v. Taylor*.[2] The amendment, which prescribes the jurisdiction of the New York Court of Claims, states: "*For purposes of this act only*, a real property tax lien shall be *deemed* to be an interest in real property." N.Y. Court of Claims Act § 9 (emphasis added).[3] If a lien had been

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[1] The Fourth Edition is the relevant source because it was the latest edition of Black's Law Dictionary available in 1976 when the FSIA was enacted. *See Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 745 (1996) (looking to dictionaries from the era in which the statute was passed); *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610-12 (1987) (same).

[2] The City does not explain how an amendment to a state statute in 1977 is relevant to Congress's understanding of the nature of liens when it enacted the FSIA in 1976.

[3] *L-C Security Serv. Corp. v. State of New York*, 434 N.Y.S.2d 883, 884 (N.Y. Ct. Cl. 1980) explains that the purpose of the amendment was to bring the claims of lienors into the Court of Claims as "the exclusive forum for both the assessment and distribution of damages in appropriation cases," not to change the organic nature of liens. *Id.* at 885.

understood to be a right in real property, there would have been no need for New York's Legislature to enact a law "deeming" a lien to be an interest in property for purposes of state court jurisdiction, and to adopt the amendment "only" for purposes of defining jurisdiction in the Court of Claims.[4]

This Court's decision in *Marshall v. Knox*, 83 U.S. 551 (1872), does not recognize liens to be rights in immovable property themselves. The "property" in dispute in that case was personal property (farm equipment), not real property. Furthermore, the full sentence, which page 8 of the City's Brief has clipped short, reveals that the Court was *not* referring to a lien, even on personalty, but rather to the claim for possession of the personal property: "*The claim*, however, *is to the right of possession,* and that right may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and is, in fact, a species of property just as much as the subject of litigation as the thing itself." *Marshall*, 83 U.S. at 557 (emphasis added).

The "takings" cases cited by the City hold only that a lienor has a personal property interest in the lien itself.[5]

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[4] The other cases that the City cites as holding that liens are interests in property for purposes of state statutes allowing notice by publication for actions to quiet title (Resp. Br. at 11) also confirm that these procedural statutes were not intended to alter substantive law holding that liens are not rights in the underlying real property. *Ormsby v. Ottman*, 85 F. 492, 495 (8th Cir. 1898) ("a mortgage or judgment lien was no interest, estate, or title in the property itself"); *Clark v. Darlington*, 63 N.W. 771, 772 (N.D. 1895).

[5] *Pasquantino v. United States*, 544 U.S. 349, 356 (2005) (right to collect taxes, right to sue on a debt, and right to be paid money are forms of *personal* property); *Armstrong v. United States*, 364 U.S. 40 (1960) (government took property when it extinguished liens); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983) (notice due mortgagee before affecting tax-sale proceedings); *United States v. Security Indus. Bank*, 459 U.S. 70 (1982) (statute affecting liens construed to avoid a

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Petitioners agree that money claims, and the liens that serve as a means of enforcing those claims, may each be "property" for whose "taking" the government must provide compensation under the Fifth and Fourteenth Amendments. But that unexceptionable proposition does not mean that claims on liens are rights in immovable property within the meaning of the FSIA. Just as a legal claim against another party does not become a right in the other party's property simply because the owner of the claim has a property interest in the claim, a statutory lien does not become a right in the underlying real property simply because the lienor has a property interest in its lien.

B. Servitudes Are Very Different From Liens.

Seizing on language in the FSIA's legislative history suggesting that section 1605(a)(4) allows jurisdiction over foreign states "to adjudicate questions of ownership, rent, servitudes and similar matters," the City argues that liens are "similar" to servitudes. Servitudes diminish the property owner's exclusive right to use and possess the property by giving a dominant tenement the right to access the property (a positive easement) or the right to limit the servient tenement's full use of the property, such as restrictions on blocking the dominant tenement's light or view (a negative easement). *See* 5 Restatement (First) of the Law of Property § 450 (1944). Unlike servitudes, liens

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constitutional question under the Takings Clause of the Fifth Amendment); *First State Bank-Keene v. Metroplex Petrol., Inc.*, 155 F.3d 732, 739 (5th Cir. 1998) (tax sale did not deprive FDIC of property rights because purchaser took the property subject to FDIC's lien); *Matagorda Co. v. Russell Law*, 19 F.3d 215, 224 (5th Cir. 1994) (FDIC's actions delaying local government's ability to foreclose on tax liens did not constitute a Fifth Amendment taking).

do not diminish the real property owner's right to exclusive use and possession of its property, nor do they grant the lienor any right to use or access the real property. Indeed, New York courts have recognized that easements are fundamentally different from liens in this respect, explaining that "[a]n easement is not a lien, encumbrance or charge against the servient estate, but is something carved out of it for the benefit of the dominant estate." *Clove Lakes Serv. Corp. v. Greif Bros. Cooperage Corp.*, 346 N.Y.S.2d 668, 670 (N.Y. Sup. Ct. 1973).

The fact that an unsatisfied lien may have an impact on the potential sales price of underlying property does not make a lien "similar" to a servitude or easement. The potential financial impact of an unsatisfied lien does not "carve out" any rights in the property for the benefit of the lienor, nor does it "carve out" any of the property owner's rights to exclusive use and possession of the property or to collect rents. And, unlike the dominant tenement's rights in an easement, which cannot be extinguished unilaterally by the servient tenement (49 N.Y. Jur., Easements and Licenses in Real Property § 160 (2006)), a lien may be extinguished unilaterally by paying the debt or claim the lien is meant to secure, because the lienor has no rights in the underlying property. *See* N.Y. Real Prop. Tax Law § 1110(1) (2007).

An action to declare the validity of a lien does not put in issue any of the types of ownership, use, and possession rights that are in issue in a dispute over the validity of a servitude or easement. While a lien may be "related to" or "arise out of" the real property owner's use of its property, Congress did not draft a real property exception covering all disputes "related to" or "arising out of" real property. Instead, Congress limited the scope of section 1605(a)(4) to cases in which "rights in" immovable property are "in issue." Similarly, in the enforcement sections of the FSIA,

Congress allowed execution against certain property for judgments "establishing rights in property." 28 U.S.C. § 1610(a)(4).[6] Congress's requirement that a judgment be one "establishing rights in property" to allow execution under section 1610(a)(4) confirms that in order to put rights in immovable property "in issue" to support jurisdiction over a foreign state, the claims must seek to "establish[] rights in" the property. In all events, Congress's choice of statutory language precludes a construction that would abrogate sovereign immunity for all claims "arising out of" or "related to" real property.[7]

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[6] Section 1610(a)(4) provides:

> "The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if – . . .
>
> (4) the execution relates to a judgment establishing rights in property –
>
> (A) which is acquired by succession or gift, or
>
> (B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission. . . .

[7] Nor does the "local action rule" justify an abrogation of sovereign immunity for actions to declare the validity of tax liens. As then-Judge Scalia explained in *Asociacion de Reclamantes v. United Mexican States*, the local action rule exists because "[a] sovereignty cannot safely permit the title to its land to be determined by a foreign power." 735 F.2d 1517, 1521 (D.C. Cir. 1984) (quoting 1 F. Wharton, Conflict of Laws § 278 (3d ed. 1905)). A subsidiary concern is "that courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation." *Id.* These rationales limit the local action rule to "questions that directly implicate interests in the property or rights to possession." *Id.* Even if some states provide that lien disputes must be resolved in local courts, the underlying rationales for the local action

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C. New York City's Lien Theory Would Improperly Create Jurisdiction For Claims Against Foreign Sovereigns Where No Jurisdiction Would Otherwise Exist.

According to the City, whenever any claim is converted into a lien by operation of local law, the claim is converted into a dispute over rights in immovable property. This lien theory of jurisdiction would abrogate immunity and create jurisdiction under the FSIA for all sorts of claims where no jurisdiction otherwise would exist. Some states apply statutory liens to both real and personal property even though the claimed tax delinquency arises only as to personal property, and the government may enforce the lien against the real property, without bothering to proceed first against the personal property. 5 Powell on Real Property § 39.04[2] (2006). Under the City's lien theory of jurisdiction, such enforcement suits could proceed against a foreign sovereign's real property, even though nothing in the FSIA provides any colorable basis for jurisdiction over personal property tax claims. Nor is there any basis for limiting the City's lien theory to statutory tax liens. For example, although the City agrees that the FSIA provides no jurisdiction over zoning or nuisance claims (Resp. Br. at 29), under its lien theory the local jurisdiction need only create a statutory lien on the offending property to provide a suitable basis for jurisdiction under section 1605(a)(4).

The City's lien theory of jurisdiction is also inconsistent with the FSIA's prohibition of the use of pre-judgment

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rule do not support a construction of section 1605(a)(4) that would require all inter-government disputes over the imposition or collection of taxes to be resolved in local courts.

attachment on a foreign sovereign's real property to obtain jurisdiction where no personal jurisdiction would otherwise exist. *See* 28 U.S.C. §§ 1609, 1610(d)(2); H.R. Rep. No. 94-1487 at 26-27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6625-26. If a party cannot gain access to the courts to recover money allegedly owed by a foreign state through judicial attachment of that foreign state's real property, then the City should not be allowed to obtain jurisdiction over the Governments of India and Mongolia to adjudicate the validity of a lien on their real property in order to enforce a claim upon which the City could not recover directly. The FSIA requires that (except for commercial maritime liens) jurisdiction over foreign sovereigns must be established on an *in personam* basis.

II. Congress Did Not Intend Statutory Tax Liens to Be Included Within the Meaning of Rights in Immovable Property.

A. The Second Restatement Recognized that Foreign Sovereigns Were Immune from Tax Enforcement Suits Under the "Restrictive" Theory of Sovereign Immunity.

The City concedes that the FSIA was intended to codify preexisting international law under the restrictive theory of sovereign immunity, and that the Restatement (Second) of Foreign Relations Law (1965) ("Second Restatement") is an authoritative reflection of those principles.[8]

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[8] The City refers to a "Draft Convention" at pp. 21-22 of its brief. The Draft Convention on the Competence of Courts in Regard to Foreign States was published in 1932 in a supplement to the American Journal of International Law as "an endeavor to offer a set of rules on this subject [of jurisdiction over foreign sovereigns] which may prove acceptable to the States of this world." 26 Am. J. Int'l Law Sup. 455,

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Resp. Br. at 19, 21. It even cites, as one of these recognized principles, the principle set forth in Section 65 of the Second Restatement that the "general rule" of sovereign immunity "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." The City buries this principle in a footnote, but even the footnote summary is clear enough: "Foreign government property is immune from tax enforcement." Resp. Br. at 22 n.19.[9] There is no genuine dispute that the present cases assert claims for tax enforcement. The City describes its asserted tax liens as having been specially created by statute to "enforce" a property owner's alleged "obligations" to "local governance," in this case the payment of real property taxes. Resp. Br. at 18.[10]

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474 (1932). The convention did not "purport" to be "a declaration of existing international law." *Id.*

[9] *Amici*, International Municipal Lawyers Association and the U.S. Conference of Mayors (collectively "Municipal Lawyers"), erroneously argue that a foreign sovereign's immunity from tax enforcement lawsuits was a relic of the "absolute" theory of immunity that "prevailed prior to the Tate Letter" of 1952. Mun. Lawyers Br. at 10. The Second Restatement applies the "restrictive" theory. Second Restatement § 69, reporters note 1.

[10] The FSIA's legislative history contains no "representations by the Executive Branch" to Congress that the text of § 1605(a)(4) would provide a basis for a lawsuit to enforce a foreign sovereign's "tax obligations." Mun. Lawyers Br. at 13. Shorthand descriptions by officials of the Departments of State and Justice of the statutory text as applying to "estate and real estate matters" (*id.* at 14) must be understood in the context of the remainder of the quoted sentence, which describes the proposed immovable property exception as "in keeping with the law at the present time." Immunities of Foreign States: Hearing on H.R. 3493 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 93rd Cong. 41 (1973). As we showed in our opening brief at pp. 17-28, the "law at the present time" was that a local government "may not compel the payment of a tax by proceeding directly against a foreign sovereign's property."

The Second Restatement accurately reflects existing international principles as they were understood in the United States when Congress adopted those principles in the FSIA. It is a far more reliable source for the restrictive theory of sovereign immunity as it was understood in 1976 than the Third Restatement, which was published ten years after the FSIA was enacted.[11]

B. Pre-FSIA Case Law Precluded Enforcement of Tax Liens Against Foreign Sovereigns.

The only relevant case decided between the 1965 publication of the Second Restatement and the 1976 enactment of the FSIA squarely held that a local government may not compel the payment of a tax by proceeding against the foreign sovereign's property. The New York Court of Appeals' decision in *Republic of Argentina v. City of New York*, 25 N.Y.2d 252 (1969), explicitly relied on Second Restatement § 65 cmt. d to support its conclusion that the City of New York "may not compel the payment of a tax by proceeding directly against the [foreign sovereign's] property." 25 N.Y.2d at 262. The New York court's ruling, like the Second Restatement on which it relies, applies the "restrictive" theory of sovereign immunity, *see* 25 N.Y.2d at 265, and it cannot be explained away, as the

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[11] Furthermore, not only does the Third Restatement offer no basis for its interpretation of § 1605(a)(4), its interpretation is flatly inconsistent with that of the immediately preceding exemption, which uses identical language. 28 U.S.C. § 1605(a)(3) exempts from sovereign immunity certain cases "in which rights in property taken in violation of international law are in issue," yet § 455 comment c to the Third Restatement reads this identical "rights in property . . . are in issue" language as "limited to actions asserting title to property and claims for compensation" for taking that property. Restatement (Third) of the Foreign Relations Law of the United States § 455 at 413 (1986).

City suggests it might, as a case that was "instituted by a foreign sovereign." Resp. Br. at 26. Argentina was the plaintiff, challenging the assessment of a tax against its consulate, but the court's ruling in its favor – that the consulate was not subject to tax or to a tax lien – depended on its underlying determination that the City could not enforce a tax claim in court. *See* Pierre N. Leval, Judging Under the Constitution: Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1256 (2006) (holding explains "why the court's judgment goes for the winner"). It is likewise immaterial that the property at issue in the *Argentina* case was used as "consular offices, not staff housing." Resp. Br. at 34 n.31. In the *Argentina* case, as in the present case, the City claimed the right to tax any foreign government property that was not specifically exempt from taxation under local law – there a consulate, here Mission premises used to house diplomatic staff. Both are, in the words used by the New York court, used for "public" or "governmental" purposes. 25 N.Y.2d at 265.

The City's reliance on two rulings by county courts in New York State, both rendered before the Second Restatement and before the ruling by New York State's highest court, is misplaced. That the county court in *City of New Rochelle v. Republic of Ghana,* 255 N.Y.S.2d 178, 179 (Westchester Cty. Ct. 1964), initially asserted subject-matter jurisdiction over the City's tax-foreclosure claim shows only that before the FSIA, "a plea or suggestion of immunity" was thought to arise "only after the court has been vested with jurisdiction." Richard Pugh & Joseph McLaughlin, Jurisdictional Immunities of Foreign States, 41 N.Y.U. L. Rev. 25, 27 (1966). Whatever the prevailing view may have been before 1976 about the relationship between "jurisdiction" and "immunity," that view has been overtaken by the FSIA, which created a new jurisdictional regime where "at the threshold of every action . . . against

a foreign state" the court's subject matter jurisdiction depends on whether the plaintiff can carry its burden of establishing that one of the FSIA's exceptions applies. *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004).

Amici Municipal Lawyers inaccurately depict the *New Rochelle* case as one in which "no suggestion of immunity was made." Mun. Lawyers Br. at 18-19. That description is controverted by the court's description of the case as one in which "the executive branch of the United States Government has recognized a claim of immunity." 255 N.Y.S.2d at 179. The court also described the Government's brief as supporting the foreign sovereign's immunity from a proceeding to enforce the city's lien claim judicially, in that case by foreclosure. 255 N.Y.S.2d at 180. The Government's brief did not preclude the mere assertion of a presently unenforceable "inchoate" lien, but even that nonlitigation option was later rejected by New York's Court of Appeals in the *Republic of Argentina* case. In that later case, the lower court found "no impediment to the assessment" (as distinct from the enforcement) of the City's liens, *Republic of Argentina v. City of New York*, 283 N.Y.S.2d 389, 392 (N.Y. Sup. Ct. 1967), but the Court of Appeals ultimately rejected even the validity of an unenforced "inchoate lien." *Republic of Argentina v. City of New York*, 25 N.Y.2d at 262.

The City also cites some "cases" from "other countries," but only two of these cases involved any sort of tax claim. The first involved Italy's lawsuit in an Argentine court for return of an inheritance tax surcharge it had paid on a bequest. In ruling against Italy, the local court found that, by suing as a plaintiff, "'[t]he government of the Kingdom of Italy has consented to submit itself to the courts of this nation.'" *Gobierno de Italia v. Consejo Nacional de Educacion,* 10 Ann. Dig. 196 (Camera Civil de la Capital 1940) (Arg.). The other is the Canada Supreme

Court's ruling that we discuss at pp. 21-22 of our opening brief, which holds that "under the principles of the law of nations" a host state's tax claim was "not exigible" against a foreign state's public property. *Reference re Tax on Foreign Legations*, [1943] 2 D.L.R. 481 (Can.). That is the principle of the law of nations set forth in Section 65 of the Second Restatement.

Each of the other cases that the City cites involved disputes over "adverse ownership interests" within the ambit of Section 68(b) of the Second Restatement or indisputably commercial activities. Some were brought by previous owners whose titles had been wrongly expropriated,[12] while others were brought to enforce contractual obligations: to pay rent,[13] or to allow repairs under a lease,[14] or to compel interest payments on a mortgage.[15] As for the others, one was an action to execute judgment on an arbitral award, and that judgment was later vacated

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[12] *Restitution of Property (Republic of Italy) Case*, 18 I.L.R. 221 (Ct. of App. of Hamm. 1951) (F.R.G.); *Jurisdiction Over Yugoslav Military Mission (Germany) Case*, 38 I.L.R. 162 (Fed. Const'l Ct. 1962) (F.R.G.); *Claim Against Empire of Iran Case*, 38 I.L.R. 37 (Fed. Const'l Ct. 1963) (F.R.G.).

[13] *Deputy Registrar Case*, 94 I.L.R. 308 (District Court of the Hague 1980) (Neth.); *U.S. Government v. Bracale Bicchierai*, 65 I.L.R. 273 (Ct. of Appeal of Naples 1968) (Italy).

[14] In *Intpro Properties (U.K.) Ltd. v. Sauvel*, 1 Q.B. 1019 (1983), plaintiffs sued to enforce a covenant of the lease that allowed plaintiffs onto the premises to conduct repairs.

[15] In the *Hungarian Embassy Case*, 65 I.L.R. 110, 112 (Fed. S. Ct. 1969) (F.R.G.), the commercial lender was entitled to execute only because the property was vacant, and therefore was not being used "for embassy purposes." Similarly, in *Republic of Latvia Case*, 22 I.L.R. 230 (Higher Ct. of App. 1955) (F.R.G.), though the nature of the dispute is not described, jurisdiction was found because the land had been abandoned and was no longer being used "for diplomatic purposes."

entirely.[16] The other was brought by the foreign sovereign, which thereby waived any immunity.[17]

Section 86 of the Code of Civil Procedure of India (cited in Resp. Br. at 25) cannot support a finding of jurisdiction in the instant cases. Under section 86, no suit may be brought against any foreign state or any corporation owned by a foreign state unless the plaintiff first obtains the consent of the Central Government of India, and we know of no case where the Central Government has granted consent to sue a foreign sovereign for real property taxes.[18]

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[16] *Suit Against Hungary*, 4 Ann. Dig. 174 (1928) (Czech.) was brought to execute an award made by an arbitration tribunal against "immovable property" of Hungary. While the court initially allowed execution, it reversed itself upon learning that the property against which execution was sought was the Hungarian Legation. *Immunity of Legation Buildings (Czechoslovakia) Case*, 4 Ann. Dig. 370 (1929) (Czech.). In vacating its earlier judgment the court wrote, "According to international law objects which directly or indirectly serve the purposes of the diplomatic service are exempt from the operation of municipal law." *Id.* at 372.

[17] The report on the post-Restatement *nisi prius* ruling by a court in Athens, Greece in *Purchase of Embassy Staff Residence Case*, 65 I.L.R 255, 257 (Trib. of First Instance, Athens 1967) (Greece) does not clearly describe the dispute. Because the foreign state was the "plaintiff," the ruling has no bearing on a foreign state's immunity from suit against it.

[18] *See also Amici* Municipal Lawyers' reliance on a 1985 Australian law, section 14(1)(a) of which contains an "immovable property" exclusion and section 20 of which separately excludes any "proceedings" that "concern" a tax obligation, demonstrates only that when nations do assert tax enforcement jurisdiction over foreign sovereigns, they do so explicitly. Foreign States Immunities Act, 1985 (Austl.). Moreover, this 1985 Australian law offers no guidance on what the U.S. Congress was thinking in 1976.

C. The European Convention on State Immunity Contains No Suggestion that Foreign Sovereigns May Be Subjected to Tax Enforcement Suits.

Glossing over the very significant textual differences between section 1605(a)(4) ("rights in immovable property . . . are in issue") and Article 9 of the European Convention on State Immunity ("obligations arising out of . . . rights or interests in, or possession or use of, immovable property"), both the City and its supporting *amici* cite the European Convention as "evidence of the international practice the FSIA was intended to codify." Resp. Br. at 22; Mun. Lawyers Br. at 15-18.

Like the FSIA, the European Convention was intended to codify the "restrictive" theory of sovereign immunity, referred to in the Convention's Explanatory Report as "relative State immunity," under which a foreign state does not enjoy immunity "when it acts in the same way as a private person in relations governed by private law." Council of Europe, European Convention: Explanatory Report, § 1. The Convention's text therefore was drafted solely to describe the private law disputes for which jurisdiction over foreign states would be appropriate. Nothing in the Convention or the practices of signatory states provides any basis for using the Convention's immovable property exception to create jurisdiction for tax enforcement lawsuits against foreign states. For example, the United Kingdom, a European Convention signatory, has a "State Immunity Act" which governs both private and governmental claims against foreign states. Section 6 provides in part that "a [foreign] State is not immune as respects proceedings relating to any interest of the State in, or its possession of, immovable property in the United Kingdom." State Immunity Act of 1978 (U.K.). But the U.K. Act contains a separate and distinct exception for

"rates" (i.e., property taxes) on "premises occupied by it for commercial purposes." *Id.* at § 11(b). This separate exception for property taxes on "premises occupied . . . for commercial purposes" would not have been needed if the "immovable property" exception in Section 6 of the Act had itself been sufficient to subject all property owned by a foreign state to tax enforcement lawsuits.

D. The Purpose of the FSIA Does Not Justify Abrogating Sovereign Immunity for Inter-Government Tax Disputes.

Respondent's assertion that the "purpose" of the FSIA requires that questions of jurisdictional immunity be decided by the courts does not support its argument that jurisdiction exists to decide government-to-government disputes over immunity from taxation. To the contrary, the purpose of the FSIA, as stated in the initial paragraphs of the House Report, is to address a concern that "American citizens" who "com[e] into contact with foreign states and entities owned by foreign states" will have "access to the courts in order to resolve ordinary legal disputes." H.R. Rep. No. 94-1487 at 6-7, 1976 U.S.C.C.A.N. at 6605. The House Report provides as examples "when U.S. businessmen sell goods to a foreign state trading company, and disputes may arise concerning the purchase price;" or "when an American property owner agrees to sell land to a real estate investor that turns out to be a foreign government entity and conditions in the contract of sale may become a subject of contention;" or "when a citizen crossing the street may be struck by an automobile owned by a foreign embassy." *Id.* Nothing in this legislative history suggests that the FSIA was designed to provide an exception for inter-governmental disputes. Nor is the City's lien theory necessary to protect American citizens in disputes with foreign sovereigns. To the extent a private

citizen would have a lien on a foreign sovereign's real property – such as a mechanic's lien for work performed on the premises – jurisdiction would exist under the commercial activities exception and there would be no need for the individual citizen to rely on the rights in immovable property exception.

E. New York City's Immaterial Arguments on the Merits of its Tax Claims Are Wrong.

Although the sole issue presented on certiorari is one of jurisdiction under the FSIA, the City devotes four pages of argument to the merits of its tax claim. This merits argument is premised almost entirely on a series of confusing diplomatic notes with very little legal analysis and vague references to issues such as "common areas."

Petitioners rely, in contrast, on a fairly straight forward analysis of the tax exemptions mandated by the Vienna Convention on Diplomatic Relations and the customary international law it was designed to codify. Under Article 23(1) of the Vienna Convention, foreign states "shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission." Petitioners contend that the "premises of the Mission" include those portions of the Mission building used to house diplomatic staff. This interpretation is supported by a 1986 Notice published by the U.S. State Department in the Federal Register entitled "Property Owned by Diplomatic Missions and Used to House the Staff of Those Missions is Exempt From General Property Taxes." 51 Fed. Reg. 27303 (July 30, 1986). The Notice

explains that Mission-owned property used to house Mission staff constitutes "premises of the Mission."[19]

The tax exemption is also mandated by customary international law. The New York Court of Appeals, rejecting the City's narrow construction of tax exemptions in *Republic of Argentina v. City of New York*, held that the tax exemptions required by customary international law are not limited to property used for a "diplomatic" purpose, but apply to all foreign government-owned property used for a "public" or "governmental" purpose. 25 N.Y.2d at 265. Housing diplomatic staff on Mission premises to facilitate the performance of their diplomatic and governmental functions is as much a "public" or "governmental" purpose as housing soldiers in barracks on a military base or providing sleeping quarters for firemen in a firehouse.

III. Housing Mission Staff in the Premises of the Mission Is Not "Commercial" Activity.

Every "commercial activity" case cited by the City involved a relationship between the foreign state and

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[19] Referencing a survey in which it found that 90% of 160 nations surveyed "exempt the United States Government from annual property taxes on diplomatic residences," the State Department confirmed the correctness of its Federal Register Notice in a July 18, 2001 diplomatic note to Sweden. U.S. Department of State, Diplomatic Note Sent from the U.S. Department of State to Sweden Concerning Exemption from Real Property Taxes (July 18, 2001) *at* http://www.state.gov/s/l/22686.htm (last visited Apr. 11, 2007). As for the meaning of "common areas," in a separate diplomatic note to Libya, the State Department explained that foreign governments owning buildings used by both tax-exempt diplomatic Missions and non-tax-exempt commercial tenants would not be able to claim tax exemptions for "common areas." U.S. Department of State, Letter to New York Department of Finance concerning Libyan Mission Tax Lien (Apr. 9, 2002) (discussing hold back of 7 floors of Libyan Mission building to commercial tenants) *at* http://www.state.gov/s/l/38710.htm (last visited Apr. 11, 2007).

private actors. In *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania,* 507 F. Supp. 311 (D.D.C. 1980), the dispute was between a foreign state and a commercial shipper. In *Joseph v. Office of the Consulate of Nigeria,* 830 F.2d 1018 (9th Cir. 1987), the action was brought by a private lessor whose house was damaged by consular employees. These cases are consistent with the FSIA's legislative history and this Court's definition of "commercial" activity as requiring a showing of the "foreign state's participation in the marketplace in the manner of a private citizen or corporation." *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992). *See also* Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the House Subcomm. on Admin. Law and Gov. Relations of the Comm. on the Judiciary, 94th Cong. 27 (1976) ("when a foreign state enters the marketplace," it cannot avoid "the economic costs of the agreement which it may breach").

In contrast, housing Mission staff on Mission premises because the foreign sovereign has determined that their presence is required to perform their diplomatic and governmental duties does not involve any entry of the foreign sovereign into any marketplace. Rather, the activity at issue in the instant cases is entirely between the Governments of India and Mongolia and their own diplomatic staffs, whose employment relationship is governed wholly by the laws of those two nations (and in the case of India, by the 37-page "Handbook of Rules and Regulations Relating to the Indian Foreign Service," set out at J.A. 102-139). *See, e.g., Broadbent v. Organization of American States,* 628 F.2d 27, 34-36 (D.C. Cir. 1980) (OAS immune from wrongful discharge claim by its administrative staff members). Accordingly, the City's alternative reliance on the "commercial activity" exception in 28 U.S.C. § 1605(a)(2) provides no basis for jurisdiction.

CONCLUSION

Petitioners respectfully request that the judgment of the Second Circuit be reversed.

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April 12, 2007

(5)

No. 06-134

In the
SUPREME COURT OF THE UNITED STATES

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS AND THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION

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December 29, 2006

STATEMENT OF FACTS

This Supplemental Brief in Opposition is submitted in response to the Brief for the United States as Amicus Curiae filed on December 22, 2006 ("US brief").

For the most part, the US brief treads no new ground, and consists largely of a discussion of the merits favorable to petitioners, similar to that expressed by the Government in response to the inquiry of the Circuit Court. As such, it is precisely the sort of expression of views on a question of statutory construction to which this Court referred in Republic of Austria v. Altmann, 541 U.S. 677, 691, 124 S. Ct. 2240, 159 L. Ed. 2d 1 (2004), when it stated, "While the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." Id. at 702.

The US brief does not contest the applicability of the Foreign Sovereign Immunities Act of 1976 ("the FSIA"), 28 U.S.C. §§ 1602-1611 to the resolution of the threshold jurisdictional question, nor that the FSIA transferred the responsibility for making determinations concerning immunity from suit from the State Department to the courts. See Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). The US brief does not dispute the applicability of the Vienna Convention on Diplomatic Relations, 21 U.S.T. 3227, and the Vienna Convention on Consular Relations, 21 U.S.T. 77, to the substantive issues that will eventually be presented for resolution should the litigation continue, nor does it question the principle that "[p]ure questions of statutory construction," such as that embodied in the Court of Appeals' decision here, are "well within the province of the Judiciary." INS v. Cardoza-Fonseca, 480 U.S. 421, 446, 448, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987).

Most significantly, the US brief does not express such an "opinion on the implications of exercising

jurisdiction over particular petitioners in connection with their alleged conduct," as Altmann suggested "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy on a case by case basis." 541 U.S. at 702. Indeed, the Government asserts no prerogatives of the Executive Branch, nor any basis for deference to it, in either this litigation or in the determination under review, and the case therefore presents no issues of Constitutional dimension.

Rather, the Government asserts nothing more than that it, and other members of the diplomatic community, await the ultimate resolution of the matter with interest as "important to our Nation's foreign relations." US brief at p. 18. As examples of that interest, the Government, at US brief, p. 19, cites speculative and nonspecific possible reactions of other nations to the outcome of this litigation. The Government thus argues that the jurisdictional question should be resolved with certainty, and it argues that a denial of certiorari in this case would fail to provide that certainty in that it would let stand a conflict between the Second Circuit and the decisions of the Third Circuit in City of Englewood v. Socialist People's Libyan Arab Jamahiriya, 773 F.2d 31 (3d Cir. 1985), and, to a lesser extent, the First Circuit in Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002) and the District of Columbia Circuit in McArthur Area Citizens Ass'n v. Republic of Peru, 809 F.2d 918 (D.C.Cir. 1987).

The Government thus asserts no ground or basis for the granting of certiorari other than the apparent split in authority that petitioners contend is found in the superficial and parenthetical treatment of the subject matter in the fifteen-year-old Englewood case, which represented, at most, an early and transitional treatment of the subject matter.[1] In contrast, the Second Circuit's decision in this case is entirely consistent with the seminal D.C. Circuit

[1] See, our main Brief in Opposition at pp 11-13.

case of Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984), which decision placed "rights to payment of money secured by an interest in land" among rights cognizable under FSIA's immovable property exception, 535 F.2d at 1523, and which cited with approval County Board v. Government of the German Democratic Republic, Civil No. 78-293-A (E.D.Va. Sept. 6, 1978), an earlier district court case that upheld jurisdiction to determine the validity of a real estate tax lien under the immovable property exception. McArthur does not present a split in authority, because, as an action for injunctive relief brought by neighbors seeking to abate the conduct of the occupants of the property, "the Association's complaint sound[ed] not in the law of real property at all, but the law of nuisance." McArthur at 921. Nor does Fagot Rodriguez present a split in authority, since that matter was "a simple contract dispute over nonpayment of rent – without more." Fagot Rodriguez, 297 F.3d at 12.

Neither petitioners nor the Government have provided sufficient reason not to let stand the decision of the Second Circuit, which simply ruled, in accordance with the plain language of a statute that reposes jurisdiction in the courts to resolve conflicts concerning rights in immovable property in this country held by foreign sovereigns, that those property-owners and taxing entities such as the City of New York, may resolve their disputes in the Courts.

Finally, we agree with the Government that the second question posed by petitioners is not fairly presented, since the Circuit Court did not, as petitioners argue, "rely on" the international agreements in question, but only referred to them, in the phrasing of the US brief at p. 19, to "shed light" on the proper construction of the FSIA's immovable property exception.

CONCLUSION

FOR THE REASONS STATED, AND FOR THE REASONS STATED IN OUR MAIN BRIEF IN OPPOSITION, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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In the Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL., PETITIONERS

v.

CITY OF NEW YORK, NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a suit to recover unpaid property taxes imposed on property owned by a foreign sovereign and to declare the validity of a tax lien arising out of those unpaid taxes falls within the exception to the general rule of immunity in the Foreign Sovereign Immunities Act of 1976 (FSIA), for cases in which rights in immovable property are in issue, 28 U.S.C. 1605(a)(4).

2. Whether the court of appeals erred by relying, in the course of interpreting the FSIA's immovable property exception, on materially different provisions in two international conventions regarding state immunity to which the United States is not a party.

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Cases—Continued: Page

County Bd. of Arlington County v. *Government of the German Dem. Rep.*, Civ. No. 78-293-A (E.D. Va. Sept. 6, 1978) (*reprinted in* 17 I.L.M. 1404 (1978)) ... 19

Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 21

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French Republic v. *Board of Supervisors*, 254 S.W. 124 (Ky. Ct. App. 1923) 17

Green v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823) 10

Guaranty Trust Co. v. *United States*, 304 U.S. 126 (1938) 2

Knocklong Corp. v. *Kingdom of Afghanistan*, 167 N.Y.S.2d 285 (County Ct. 1957) 15

Leonard v. *Schwartz*, 100 N.Y.S.2d 802 (App. Div. 1950) 21

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Massingill v. *Downs*, 48 U.S. (7 How.) 760 (1849) 21

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Rafael v. *Verelst*, 96 Eng. Rep. 621 (K.B. 1776) 10

Cases—Continued: Page

Reference as to the Powers of Ottawa and Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences, In re, [1943] S.C.R. 208 (Can.) 17

Republic of Argentina v. *City of New York*, 250 N.E. 2d 698 (1969) 14, 16, 17, 25, 30

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Republic of France v. *City of New York*, 74 N.Y.J.L. 1279 (N.Y. Sup. Ct. 1925) 18

The Schooner Exch. v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812) 9

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United Capital Corp. v. *183 Lorraine St. Assocs.*, 675 N.Y.S.2d 543 (App. Div. 1998) 23

United States v. *Ansonia Brass & Copper Co.*, 218 U.S. 452 (1910) 25

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United States v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929) 18

United States v. *Fox*, 94 U.S. 315 (1877) 10, 11

United States v. *Whiting Pools, Inc.*, 462 U.S. 198 (1983) 22

Cases—Continued: Page

United States v. *Yousef*, 327 F.3d 56 (2d Cir. 2003), cert. denied, 540 U.S. 933 (2003) 12
Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 2, 3, 9
Ward v. *Chamberlain*, 67 U.S. (2 Black) 430 (1863) 21
Weinstein v. *Taylor*, 234 N.Y.S.2d 926 (Sup. Ct. 1962), aff'd, 242 N.Y.S.2d 707 (App. Div. 1963) 21

Treaties and statutes:

European Convention on State Immunity, *done* May 16, 1972, 1495 U.N.T.S. 181:
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United Nations Convention on Jurisdictional Immunities of States and Their Properties, *opened for signature* Jan. 17, 2005, 44 I.L.M. 803 (2005):
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Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 26
Art. 31(a), 23 U.S.T. at 3240, 500 U.N.T.S. at 112 27
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Act of Nov. 14, 2005, Pub. L. No. 109-102, 119 Stat. 2195:
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Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*) 2
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N.Y. Real Prop. Tax Law § 418(1) (McKinney 2000) 4
N.Y.C. Admin. Code § 11-354 (2003) 4

Statutes—Continued: Page

State Immunity Act 1978, ch. 33 (U.K.), 17 I.L.M. 1123 (1978) 29
§ 6(1)(b), 17 I.L.M. 1125 29
§ 11(b), 17 I.L.M. 1126 29
§ 16(5), 17 I.L.M. 1127 29

Miscellaneous:

Advisory Comm. of the Research in Int'l Law, *Codification of International Law*, 26 Am. J. Int'l L. Supp. 1 (1933) 10, 12, 13, 15
Eleanor Wyllys Allen, *The Position of Foreign States before National Courts, Chiefly in Continental Europe* (1933) 12, 15
William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239 (1920) 16
Council of Europe, *European Convention on State Immunity: Explanatory Report* (visited Feb. 28, 2007) <http://conventions.coe.int/treaty/en/reports/HTML/074.htm> 29
Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (2d ed. 1998) 9, 10, 14, 15, 27
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 22, 24, 25, 26
2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* (2d ed. 1945) 3, 12

Miscellaneous—Continued: Page

Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976) 2, 3, 9, 14, 26

Melvyn Mitzner, *Liens and Encumbrances in Real Estate Titles* (James M. Pedowitz ed., 1984) 24

Note, *The Immunity of Foreign Consulate Property from Real Property Taxation: United States v. Glen Cove*, 38 Alb. L. Rev. 976 (1974) 13

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5 Richard R. Powell, *Powell on Real Property*:

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(Mar. 1996) 22

Real Estate Titles (James M. Pedowitz ed., 1984) 24

Restatement (Second) of Foreign Relations Law of the United States (1965) 11

1 Restatement (Third) of Foreign Relations Law of the United States (1987) 11

5 Restatement (First) of Property (1944) 21, 23

Sixth Report on Jurisdictional Immunities of States and Their Property, Sompong Sucharitkul, Special Rapporteur, U.N. Doc. A/CN.4/376 (1984) <http://untreaty.un.org/ilc/documentation/english/a_cn4_376.pdf> 29

Joseph Story, *Commentaries on the Conflict of Laws* (1834) 10

Miscellaneous—Continued: Page

Summary Records of the 2220th Meeting, [1991] 1 Y.B. Int'l L. Comm 84, U.N. Doc. A/CN4/SER. A/1991 29

Herbert Thorndike Tiffany, *The Law of Real Property* (3d ed. 1939):

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Cornelius Van Bynkershoek, *De Foro Legatorum* (1702) 10

6 Marjorie M. Whiteman, *Digest of International Law* (1968) 11

In the Supreme Court of the United States

No. 06-134

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL., PETITIONERS

v.

CITY OF NEW YORK, NEW YORK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the Foreign Sovereign Immunities Act of 1976, confers jurisdiction on a United States court to adjudicate the question whether a foreign state's real property, used in connection with its mission to the United Nations, is subject to taxation. The United States has a significant interest in the resolution of that question. Allowance of such suits would adversely affect the Nation's foreign relations by subjecting foreign states to suit in the United States on claims as to which both historical and present international practice afford immunity. Such suits in the United States could also encourage foreign states to assert jurisdiction in such cases or to take retaliatory actions against property of the United States abroad. In response to

the Court's invitation, the Solicitor General filed a brief at the petition stage expressing the views of the United States.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (28 U.S.C. 1330, 1602 *et seq.*), "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA establishes a general rule that a foreign sovereign is immune from suit in the United States. 28 U.S.C. 1604. The FSIA also sets out defined exceptions to that rule of immunity. 28 U.S.C. 1605 (2000 & Supp. IV 2004). A court may exercise jurisdiction over a foreign state only if the suit comes within one of those specified exceptions to immunity. See 28 U.S.C. 1330(a); *Verlinden*, 461 U.S. at 493.

Before 1952, the United States followed a policy of extending "virtually absolute immunity to foreign sovereigns," *Verlinden*, 461 U.S. at 486, under which "foreign sovereigns and their public property [we]re * * * not * * * amenable to suit in our courts without their consent," *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 134 (1938). In 1952, the Department of State announced the adoption of the "restrictive" theory of foreign sovereign immunity. See Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952) (Tate Letter), *reprinted in Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976). The Tate Letter stated that thenceforth the Department would recommend that foreign states be granted immunity only for their sovereign or public acts (*jure imperii*), and not for their commercial acts (*jure gestionis*). *Ibid.* See *Verlinden*, 461 U.S. at 487. "For the most part, the [FSIA] codifies, as a matter of

federal law, the restrictive theory of sovereign immunity." *Id.* at 488.

The immunity exception at issue in this case predates the Tate Letter. Even under the "absolute" theory of sovereign immunity, it was recognized that immunity did not bar certain claims "with respect to real property." Tate Letter (*Alfred Dunhill*, 425 U.S. at 711) ("There is agreement by proponents of both [the absolute and restrictive] theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property."). A foreign sovereign that acquired immovable property in the territory of another sovereign was "deemed to do so subject to the condition that the territorial sovereign may subject to adjudication before its tribunals questions pertaining to title or the adverse interests of individual claimants." 2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945).

The immunity exception for immovable property was carried forward and recodified by Congress in 1976 in the FSIA. 28 U.S.C. 1605(a)(4). Under that provision, a foreign state shall not be immune in any case "in which * * * rights in immovable property situated in the United States are in issue." *Ibid.*

2. Respondent City of New York brought suit against petitioners, the Permanent Mission of India to the United Nations and the Permanent Representative of Mongolia to the United Nations, based on their failure to pay local property taxes imposed by respondent on certain properties owned by the governments of India and Mongolia. The properties contain the offices of petitioners' missions to the United Nations and are used in part to house mission diplomats and other employees at a rank below that of Permanent Resident or Consul General. Respondent contends that, under New York law, the part of the properties used for such housing is tax-

able. Pet. App. 1a-3a; N.Y. Real Prop. Tax Law § 418(1) (McKinney 2000).

Respondent seeks recovery of $16.4 million in unpaid taxes and interest from India, representing primarily real estate taxes imposed between 1991 and 2003. J.A. 76.[1] Respondent seeks recovery of $2.1 million from Mongolia, representing real estate taxes imposed between 1980 and 2003. J.A. 87. Respondent also seeks a declaratory judgment in both actions establishing the validity of tax liens on the properties due to petitioners' failure to pay the taxes levied by respondent. See Pet. App. 21 n.16.[2]

Petitioners maintain that the FSIA immunizes them from respondent's suit and, on the merits, that the property is exempt from taxation pursuant to treaty. Pet. App. 22-23, 28 n.2. Petitioners contend that the residential parts of the mission buildings are intimately connected to the missions themselves because, in light of the time differences between New York and the home countries, the governments of India and Mongolia require certain staff at the missions "to be available day and night to respond to inquiries and communications from the Ministry and transmit reports about developments at the United Nations to the Ministry." Pet. Br. 2, 3.

3. The district court denied petitioners' motions to dismiss the claims as barred by foreign sovereign immunity. Pet. App. 25-45. The court held that it possessed jurisdiction

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[1] Respondent also seeks to collect certain amounts for sidewalk repair and elevator charges relating to the property. See J.A. 74-76.

[2] Respondents initially sought to foreclose on the properties. See J.A. 71 (requesting a "Judgment of Foreclosure"); J.A. 80 (same); N.Y.C. Admin. Code § 11-354 (2003) (authorizing city to maintain an action to foreclose a tax lien by, *inter alia*, selling property subject to tax lien "to the highest responsible bidder"). However, respondent conceded in the court of appeals that it would not be able to execute a judgment against the properties, see C.A. Br. 31-32, because execution would be barred by the FSIA, see 28 U.S.C. 1609-1611.

over respondent's claims pursuant to the FSIA's "immovable property" exception, 28 U.S.C. 1605(a)(4). Pet. App. 21.[3]

The court of appeals affirmed. Pet. App. 1-24. It construed Section 1605(a)(4)'s exception for claims in which "rights in immovable property * * * are in issue" to extend to cases involving three types of issues: "(1) the foreign country's rights to or interest in immovable property situated in the United States; (2) the foreign country's use or possession of such immovable property; or (3) the foreign country's obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime." *Id.* at 17-18 & n.13.

The court of appeals found the text of the immovable property exception to be "ambiguous." Pet. App. 8. Although the court noted that the State Department construed the provision not to apply to claims to recover unpaid taxes or to declare the validity of a tax lien, the court held that that interpretation was not entitled to deference. *Id.* at 22 n.17. Instead, the court interpreted Section 1605(a)(4) to be "synonymous to" a provision of the European Convention on State Immunity that abrogates immunity for all claims involving "obligations arising out of [the state's] rights or interests in, or use or possession of, immovable property," *id.* at 13-14 (quoting European Convention on State Immunity (European Convention), *done* May 16, 1972, art. 9, 1495 U.N.T.S. 181, 184). The court also relied on a similar provision in Article 13 of the United Nations Convention on Jurisdictional Immunities of States and Their Properties (U.N. Convention), *opened for signature* Jan. 17, 2005, 44 I.L.M. 803, 808 (not in force),

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[3] The court declined to reach respondent's alternative argument that the court possessed jurisdiction under the commercial activity exception to immunity, 28 U.S.C. 1605(a)(2). Pet. App. 21. The court of appeals also declined to address that theory of jurisdiction. *Id.* at 5.

a Convention that post-dates the FSIA by nearly 20 years and that the United States has not signed. Pet. App. 14 n. 9, 15 n.10.

SUMMARY OF ARGUMENT

The FSIA's "immovable property" exception, 28 U.S.C. 1605(a)(4), permits a district court to exercise jurisdiction over a foreign sovereign in a case in which "rights in immovable property situated in the United States are in issue." That provision confers jurisdiction over disputes regarding "rights in" the property itself, such as title, easements, or possession. It does not authorize courts to adjudicate disputes regarding one state's authority to tax the property of the other. The court of appeals' construction of the exception to permit claims to collect unpaid property taxes and to declare the validity of a tax lien is at odds with the provision's text, historical practice, and current international practice.

The real property exception pre-dates not only the FSIA, but also the United States' adoption of the restrictive theory of immunity. Thus, it should be construed in a manner consistent with its acceptance by even those who espoused an "absolute" view of foreign state immunity. As indicated by the commentary of legal scholars and judicial opinions, the real property exception grew out of the "necessity" that a sovereign be able to determine all issues relating to the title and possession of property within its realm, and was limited to suits of that nature. The absence of any pre-FSIA suit adjudicating a tax claim against an unconsenting foreign sovereign demonstrates that there is no similar "necessity" for domestic courts to resolve such disputes. To the contrary, disputes between sovereigns regarding the susceptibility of property to taxation are properly resolved on a state-to-state basis.

Those judicial decisions applying the real property exception since its codification in the FSIA also reflect its narrow

scope. Consistent with the exception's text and historical practice, those decisions have construed Section 1605(a)(4) to allow only suits in which ownership, use, or possession of the property itself is in issue. The only court of appeals decision to address application of the exception to a tax claim (before the decision in this case) also held that, because a tax claim does not relate to ownership, use, or possession of the property, it does not fall within the scope of Section 1605(a)(4). A lien does not represent a right in the property itself, but instead provides security for the lien-holder's true interest, which is a money debt. Notably, under New York law, a property owner may redeem its property, and discharge a lien, by paying the money debt at any time before foreclosure.

The court of appeals' reliance on the real property exceptions contained in the European and United Nations conventions, to which the United States is not a party, was in error. Section 1605(a)(4) conspicuously omits the broadly-phrased provisions of those conventions on which the court of appeals relied. In any event, the court of appeals' interpretation of those conventions was in error. Neither encompasses a claim for unpaid taxes or one based on a tax lien on real property owned by a foreign state and used for governmental purposes. Significantly, the Vienna Convention on Diplomatic Relations, to which the United States is a party and which is referred to in the FSIA's legislative history, has a real property exception that would exclude tax claims such as those at issue here.

ARGUMENT

A. Tax Claims Are Not Rights In Immovable Property, And Thus Fall Outside The Text Of Section 1605(a)(4)

Section 1605(a)(4) establishes an exception to the general rule of foreign state immunity for cases in which "rights in immovable property * * * are in issue." 28 U.S.C. 1605(a)(4). The textual requirement that "rights in" real property must

actually be "in issue" makes clear that rights of ownership, use, or possession of the property must be at stake in order for the exception to apply. See *Fagot Rodriguez* v. *Republic of Costa Rica*, 297 F.3d 1, 13 (1st Cir. 2002) ("[T]he immovable property exception applies only in cases in which rights of ownership, use, or possession are at issue.").[4]

A local government's interest in taxing a foreign state's real property is not a "right in" that property in any ordinary meaning of the term. Nor is it reasonable to construe that term, as the court of appeals did, to reach all "obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime." Pet. App. 17-18 & n.13. Section 1605(a)(4) speaks of "rights," not "obligations," and specifically of rights "in" property, not broadly of obligations arising out of a foreign sovereign's relationship to the property. The plain language of the text is inconsistent with an interpretation of the provision as applying to a dispute over unpaid taxes.[5]

B. The Historic Origins Of The Real Property Exception Confirm Its Narrow Scope

In determining the scope of the FSIA's exceptions to immunity, it is appropriate to look to the meaning generally given to those exceptions at the time the statute was enacted. See *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 613

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[4] As discussed below, see pp. 20-24, *infra*, the exception encompasses claims regarding the "use" of property only in the sense that they involve traditional property rights to use of the property, such as easements, not in the broad sense employed by the court of appeals—"obligations arising directly out of such * * * use of the property," Pet. App. 17-18.

[5] Congress used broad "arising out of" language in the FSIA when it so intended, as in the immunity exception for domestic torts that immediately follows the real property exception. See 28 U.S.C. 1605(a)(5)(B).

(1992); see also *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) (Scalia, J.) (Section 1605(a)(4) should be interpreted by reference to "the pre-existing real property exception to sovereign immunity recognized by international practice" at the time the FSIA was enacted), cert. denied, 470 U.S. 1051 (1985). Reference to historic practice is particularly appropriate to determine the scope of the real property exception, which was "accepted by writers as early as Grotius." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* 237 (2d ed. 1998).

1. The court of appeals based its analysis of Section 1605(a)(4) on the mistaken premise that the real property exception had its roots in the notion that ownership of real estate in a foreign country must be considered a private act. Pet. App. 9. That characterization conceives of the real property exception as one manifestation of the restrictive theory of immunity "that animates the Tate Letter." *Ibid.* However, the real property exception predated the United States' acceptance of the restrictive theory, and was, in fact, agreed to "by proponents of both [the absolute and restrictive] theories" of immunity. Tate Letter (*Alfred Dunhill*, 425 U.S. at 711). Thus, the exception should be construed not in light of the relatively recent distinction between public or private acts, but in light of the principles that motivated acceptance of the exception among even those who adhered to an otherwise absolute view of foreign state immunity in the era before the Tate Letter.[6]

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[6] The court of appeals cited *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), as supporting a distinction with respect to immunity between a foreign sovereign's public and private acts. Pet. App. 16-17. To the contrary, as this Court has observed, *The Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden*, 461 U.S. at 486.

Even outside the immunity context, "[i]t is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated." *United States* v. *Fox*, 94 U.S. 315, 320 (1877). See *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 12 (1823) (Story, J.) ("Every government has, and from the nature of sovereignty must have, the exclusive right of regulating the descent, distribution, and grants of the domain within its own boundaries."). The real property exception is likewise rooted in the principle "that land is so indissolubly connected with the territory of a State that the State of the situs cannot permit the exercise of any other jurisdiction in respect thereof." Advisory Comm. of the Research in Int'l Law, *Codification of International Law*, 26 Am. J. Int'l L. Supp. 1, 578 (1932) (Harvard Research draft); Denza 237 (citing Cornelius Van Bynkershoek, *De Foro Legatorum* (1702)). The exception thus reflects the territorial sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes*, 735 F.2d at 1521.[7]

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[7] As then-Judge Scalia recognized in *Asociacion de Reclamantes*, similar considerations also underlie "the 'local action rule,' which makes the locality's power exclusive and deprives other courts of jurisdiction to settle questions involving real estate." 735 F.2d at 1521-1522. At common law, local actions were limited to the adjudication of "rights of real property," *Rafael* v. *Verelst*, 96 Eng. Rep. 621, 622 (K.B. 1776) (DeGrey, C.J.); Joseph Story, *Commentaries on the Conflict of Laws* 457-458 (1834) (explaining that local actions were *in rem* in nature, and did not give rise to jurisdiction over the person whose rights were adjudicated). Even in modern practice, in which the local action rule is principally a function of statutory law and varies somewhat among jurisdictions, the doctrine is typically understood—like the immovable property exception—to be "limited to questions that directly implicate interests in the

There is no sense in which the "necessity of the case," *Fox*, 94 U.S. at 320, requires the courts of one state to adjudicate a dispute between it and another sovereign as to whether international law permits the former to tax the diplomatic property of the latter. Indeed, the absence, conceded by respondent (Br. in Opp. 15), of any instance of a court's exercising such jurisdiction before the FSIA's enactment would seem to be conclusive evidence that there is no "necessity" for the adjudication of cases of that sort in a state's domestic courts.

2. Pre-FSIA legal scholarship described the real property exception to foreign sovereign immunity in narrow terms that would exclude a claim seeking to recover unpaid taxes on real property. The Restatement (Second) of Foreign Relations Law of the United States (Second Restatement), for example, published in 1965, stated that the exception permitted "actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction." *Id.* § 68 cmt. d at 207. Underscoring the narrow scope of the exception, the Second Restatement explained that it did not include "a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." *Ibid.*; see also 6 Marjorie M. Whiteman, *Digest of International Law* 638 (1968) (quoting Second Restatement).[8]

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property or rights to possession." *Asociacion de Reclamantes*, 735 F.2d at 1522.

[8] The Restatement (Third) of Foreign Relations Law of the United States (1987) (Third Restatement), which post-dates the FSIA by more than a decade, is obviously a less relevant source for interpreting the Act than is the Second Restatement. The Third Restatement asserts that, in addition to "controversies relating to rights of ownership, possession, occupation, or use," the immovable property exception extends "as well" to "controversies concerning payment of rent, taxes, and other fees concerning" foreign state property. 1 Third Restatement § 455 cmt. b at 412. That statement, for which the Third Restatement offers no authority, appears to be aspirational rather than a

Similarly, a leading American treatise on international law explained in 1945 that the exception permitted a court to exercise jurisdiction to resolve "questions pertaining to title or the adverse interests of individual claimants." 2 Hyde 848. Another treatise, published in 1933, similarly described the exception, in European practice, as limited to actions "*in rem*," such as actions brought to determine "ownership, boundaries, partitions, possession," and the succession of property left to the foreign state. Eleanor Wyllys Allen, *The Position of Foreign States before National Courts, Chiefly in Continental Europe* 44, 70.[9]

Indeed, even the "very broad" immovable property exception proposed in 1932 by the Harvard Research draft convention on foreign state immunity would have limited a court's jurisdiction to proceedings "relat[ing] to rights or interests in, or to the use of, immovable property." 26 Am. J. Int'l L.

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statement of existing law. The Second Circuit has cautioned courts against uncritical reliance on the "controversial" Third Restatement. *United States* v. *Yousef*, 327 F.3d 56, 100 n. 31, cert. denied, 540 U.S. 933 (2003). That admonition is particularly appropriate where the Third Restatement seeks to broaden a rule after Congress has acted.

[9] Allen noted a distinction between "'real' actions affecting the immovable property, where the jurisdiction is absolute," and suits "only incidentally concerned therewith, where jurisdiction may or may not be assumed, according to the general policy of the courts regarding public and private acts of a foreign state." Allen 15. The FSIA's real property exception reflects the former, which was accepted even within the otherwise absolute theory of immunity, whereas the latter exception, which reflects the restrictive theory, is embodied in other provisions of the FSIA, such as the FSIA's commercial property exception, 28 U.S.C. 1605(a)(2).

Supp. at 456 (art. 9).[10] This proposed exception—which the accompanying commentary makes clear went beyond established international practice at that time—would have permitted only litigation related to property rights such as fee ownership, possession, or interests such as "leasehold, joint-tenancy or tenancy in common, contingent interests, life interests and the like." *Id.* at 572-573. It would have extended jurisdiction to a broader range of disputes involving use of the property. Nonetheless, even that aspect of the Harvard Research draft's proposal would not have encompassed the broad exception articulated by the court of appeals, and certainly not a tax claim. The commentary made clear that the draft's reference to claims involving "use" of real property concerned nuisance-type claims where one owner uses his property in a way that interferes with his neighbor's use or possession of his property. See *id.* at 573 (offering example of state's operation of factory that interferes with neighbor's right of peaceful enjoyment to his residence). Significantly, the commentary acknowledged that judicial precedent did not support an exception even to that extent, much less one that would permit adjudication of an inter-sovereign dispute regarding tax liability. See *id.* at 573 (Austrian court rejected suit for injunction against Germany relating to its construction on property); *id.* at 580-583 (German court dismissed suit against Poland for damages and injunction to remove coat of arms from building in which its consulate leased space).

3. Pre-FSIA case law also demonstrates that there was no historical exception to foreign sovereign immunity for the

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[10] The Harvard Research draft "represented the work of a number of eminent international legal scholars," and "[i]ts weight was highly persuasive as a *projection* of where the law concerning diplomatic and consular immunities was believed *to be headed*." Note, *The Immunity of Foreign Consulate Property from Real Property Taxation: United States v. Glen Cove*," 38 Alb. L. Rev. 976, 977 (1974) (emphasis added).

adjudication of tax claims. Respondent acknowledges that "prior to the enactment of the FSIA, no court exercised jurisdiction over a real property tax" claim of the kind it asserts here, but contends that the absence of historical precedent for its suit "is of no significance, because it is also true that no court during that period declined to exercise such jurisdiction." Br. in Opp. 15-16. In fact, there are cases in which such jurisdiction was asserted but refused. See pp. 14-15, *infra*. Moreover, the conceded absence of cases in which jurisdiction was exercised over such a claim is, in itself, quite significant. The exception upon which respondent relies is one that was "accepted by writers as early as Grotius," Denza 237, and acknowledged by proponents of the "absolute" theory of immunity, see Tate Letter (*Alfred Dunhill*, 425 U.S. at 711). It is incumbent upon respondent to demonstrate that a suit to establish a foreign state's tax liability would have been recognized as falling within that non-controversial exception. But respondent can do nothing of the kind. Rather, in each case that does address a state's ability to impose or adjudicate a tax liability against real property, the holding was adverse to the municipality.[11]

In at least two instances in which municipalities did bring suit to foreclose on tax liens, one *in personam* and the other *in rem*, the courts dismissed the suits as barred by sovereign

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[11] The court of appeals cited the cases of *Republic of Argentina* v. *City of New York*, 250 N.E.2d 698 (N.Y. 1969), and *United States* v. *City of Glen Cove*, 322 F. Supp. 149 (E.D.N.Y.), aff'd, 450 F.2d 884 (2d Cir. 1971) (per curiam), as making it "clear that, at the time of the FSIA's enactment, courts had jurisdiction to hear disputes such as this one." Pet. App. 17 n.12. Neither case involved a suit *against* an unconsenting foreign state, and thus neither presented a question of the foreign sovereign's immunity from the courts' jurisdiction. In the former, the Republic of Argentina sued to have the city's tax liens declared invalid, 250 N.E.2d at 699, and in the latter the United States sued to have tax liens on the Soviet Union's diplomatic residence discharged, 322 F. Supp. at 150, 155.

immunity. See *City of New Rochelle* v. *Republic of Ghana*, 255 N.Y.S.2d 178 (County Ct. 1964); *Knocklong Corp.* v. *Kingdom of Afghanistan*, 167 N.Y.S.2d 285 (County Ct. 1957). In *Knocklong*, the plaintiff, who held a tax deed for property used as the residence of the Kingdom of Afghanistan's principal representative to the United Nations, brought *in personam* claims against the Kingdom and U.N. representative to determine title to the property. *Id.* at 286. On the basis of the State Department's suggestion of sovereign immunity, the court dismissed the claims. *Id.* at 286-287. In *City of New Rochelle*, the court, on the basis of the State Department's suggestion of immunity, dismissed the municipality's *in rem* actions to foreclose on tax liens against real property owned by several foreign countries and used to house their principal representatives to the United Nations. 255 N.Y.S.2d at 179-180. The court noted that "the overwhelming weight of opinion holds that jurisdiction over proceedings such as these should not be exercised." *Id.* at 180.[12]

The lack of jurisdiction over tax claims against foreign sovereigns was often cited as a reason not to tax the property of foreign sovereigns in the first place. One reason commentators gave for exempting foreign sovereigns from property taxes was "the impossibility of collecting any taxes, since for-

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[12] Although the dismissal in *City of New Rochelle* case appears to have been premised on the immunity of the foreign state's diplomatic property, rather than the immunity of the foreign state itself, that fact does not diminish its relevance to the question whether tax claims were recognized as falling within the real property exception. That exception to immunity was, after all, generally regarded as being limited to "jurisdiction *in rem* over [the] property" itself. Allen 70. See Denza 238 (Vienna Convention on Diplomatic Relations' immunity exception for a "real action is equivalent to an action *in rem*" for "title or possession"). The more aspirational Harvard Research draft, in contrast, took the view that "[i]t is not considered desirable to limit such proceedings to what are known in some legal systems as 'real actions' or 'actions *in rem*.'" 26 Am. J. Int'l L. Supp. at 573.

eign states and their property are not subject to suit or judicial process." William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239, 256 (1952); see *id.* at 242 (quoting 5 Op. Att'y Gen. Mass. 446 (1920) ("[E]ven in the event that a tax [on personal property] were valid, no proceedings could be had in any court in the Commonwealth to enforce its payment, either against the foreign government or the property taxed so long as it was owned by that government. This fact alone strongly indicates that it was never intended by our statutes to impose such a tax.")).

In *Republic of Argentina* v. *City of New York*, 250 N.E.2d 698 (1969), the New York Court of Appeals held that property of Argentina used for consular affairs was immune from taxation. *Id.* at 704. The court rested its decision, in part, on the fact that "it would be difficult, if not impossible, to enforce the collection of any tax levied against a friendly foreign government if the latter were not disposed to pay it." *Id.* at 701. Because "no sovereign state can itself be sued without its consent, and its governmental property is not susceptible to attachment, levy or seizure by the courts or other authorities of a foreign country," the court regarded levy of the tax as "a futile gesture." *Id.* at 701-702. The court went on to reject the very contention that is the central premise of respondent's arguments in this suit—that the city's "claims for unpaid taxes constitute a lien on the property upon which it would be able to act when and if the foreign government disposes of the premises." *Id.* at 702. The city, the court held, had "no power to transform its tax claim into a lien." *Ibid.* "Just as it may not compel the payment of a tax by proceeding directly against the plaintiff's property, its imposition of a lien, which would affect the property indirectly * * *, would constitute an impermissible exercise of jurisdiction over another state's property." *Ibid.* Cf. *The Western Maid*, 257 U.S. 419, 432-434

(1922) (rejecting contention that "dormant" maritime liens arose against ships in the possession of the United States that "became enforcible [*sic*] as soon as the vessels came into hands that could be sued"). The court therefore affirmed the grant of summary judgment in Argentina's favor discharging the city's tax liens. *Republic of Argentina*, 250 N.E.2d at 699, 704.[13]

A decision by the Supreme Court of Canada in 1943 similarly indicates that, pre-FSIA, a foreign state was immune from suit to collect municipal taxes as well as from liens on its property as a means of securing payment. *In re Reference as to The Powers of Ottawa and Rockcliffe Park to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208 (Can.). That court held that a municipality could not levy taxes on properties of foreign sovereigns used as legations. Chief Justice Duff explained that the courts "are without jurisdiction" over a tax dispute against a foreign state and also rejected the notion that the tax could, like a lien, "stand as against the purchaser" of the property because such a charge "would be the assertion of 'a right' * * * 'over the property of a foreign sovereign.'" *Id.* at 229-230 (quoting *The Tervaete*, [1922] P. 259, 272 (Eng. C.A.) (opinion of Scrutton, L.J.)). See *id.* at 233 (opinion of Rinfret, J.) (city cannot "create any effective charge upon the property" because such "would only mean an indirect way of coercing the foreign State"); *id.* at 249 (opinion of Tashereau, J.) (concurring in opinion of Duff, C.J.).[14]

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[13] The Court of Appeals of Kentucky similarly reasoned that tobacco owned and possessed by France could not be subjected to a municipal tax because "[i]t is conceded that the French Republic is not suable in our courts without its consent, and that the tobacco itself cannot be subjected to the payment of the tax." *French Republic* v. *Board of Supervisors*, 252 S.W. 124, 125 (1923).

[14] In *Republic of France* v. *City of New York*, the New York Supreme Court refused to discharge tax liens on real property owned by a New York

C. The FSIA Did Not Expand The Real Property Exception To Encompass Tax Suits Such As This

Notwithstanding the absence of any pre-FSIA precedent of a court's exercising jurisdiction over an unconsenting foreign state to establish a property tax liability, respondent contends that the FSIA's real property exception does confer such jurisdiction. But Section 1605(a)(4) codified, rather than expanded, the exception. As the cases construing that section confirm, the statutory exception, like its historical predecessor, is limited to claims that assert a right to ownership, use, or possession of property. A tax lien is not a right in property, but rather represents security for a debt, whether conceded or merely alleged. Moreover, to allow respondent to establish jurisdiction based on an asserted lien against petitioners' property would run afoul of the FSIA's prohibition on attachments in aid of jurisdiction.

1. Before the instant litigation, only two courts had addressed the question whether the FSIA's real property exception encompasses property tax claims. The Third Circuit held that it does not. *City of Englewood* v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (1985). The court considered both the text and legislative history of Section 1605(a)(4), as well as other judicial decisions construing it, and concluded that the "exception deals with the recognized principle of in-

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corporation that was in turn owned by the Republic of France. See 74 N.Y.L.J. 1279 (1925) (reprinting decision by Justice Riegelmann). Because the suit was brought by the foreign state to remove the liens, no issue of foreign state immunity was presented. Moreover, because the property was owned by a separate corporate entity, created under the laws of New York, France's sovereign immunity would not have been extended to the corporation under the separate entity doctrine then applied by many courts. See, *e.g.*, *United States* v. *Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929). Accord 28 U.S.C. 1603 (excluding from definition of "foreign state" any "separate legal person" that is "a citizen of a State of the United States").

ternational law that a sovereign may resolve disputes over title to real estate within its geographic limits," and thus is "limited to disputes directly implicating property interests or rights to possession." *Id.* at 36 (quoting *Asociacion de Reclamantes*, 735 F.2d at 1522).[15] In contrast, a district court held, without analysis of the text, history, or intended scope of the exception, that the question of the validity of an asserted tax lien was a right in property within Section 1605(a)(4). *County Bd. of Arlington County* v. *Government of the German Dem. Rep.*, Civ. No. 78-293-A (E.D. Va. Sept. 6, 1978) (*reprinted in* 17 I.L.M. 1404 (1978)). Notably, that decision became the subject of diplomatic negotiations with the German Democratic Republic, and the Fourth Circuit subsequently held, in litigation brought by the United States, that the foreign state's property was immune from taxation and from execution of any tax lien. *United States* v. *County of Arlington*, 669 F.2d 925 (4th Cir.), appeal dismissed, cert. denied, 459 U.S. 801 (1982). Thus, the district court's ruling offers little support to respondent.

Moreover, like the Third Circuit in *Englewood*, other appellate decisions construing Section 1605(a)(4) have rejected the broad construction adopted by the court of appeals in this case, holding instead that the exception is limited to a narrow class of claims involving title, possession, or similar property interests. Those courts have recognized that the exception

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[15] The United States filed a brief *amicus curiae* in the *Englewood* case supporting rehearing en banc and stating the view that Section 1605(a)(4) "include[s] actions for property taxes." U.S. *Amicus* Br. at 10, *City of Englewood*, *supra* (No. 84-5746). That brief did not examine pre-FSIA practice with respect to the historical real property exception. Rather, the brief was premised on the mistaken understanding that the real property exception in the European Convention, art. 9, 1495 U.N.T.S. at 184, would permit such claims and an attempt to harmonize the FSIA with that Convention. U.S. *Amicus* Br. at 8-10, *City of Englewood*, *supra* (No. 84-5746). As discussed at pp. 28-29, *infra*, that Convention does not permit adjudication of tax claims.

"was not intended broadly to abrogate immunity for any action touching upon real estate," *MacArthur Area Citizens Ass'n* v. *Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir.), modified, 823 F.2d 606 (D.C. Cir. 1987), but is limited to "cases in which rights of ownership, use, or possession are at issue," *Fagot Rodriguez*, 297 F.3d at 13. See, *e.g.*, *Asociacion de Reclamantes*, 735 F.2d at 1520-1522 & n.5 (noting that Section 1605(a)(4) is focused on disputes over "title and possession"). Those courts have rejected a claim for "purely compensatory rights," such as unpaid rent, *Fagot Rodriguez*, 297 F.3d at 11, and nuisance, *MacArthur Area Citizens*, 809 F.2d at 921, even if, in the words of the court of appeals in this case, those claims relate to "the foreign country's obligations arising out of [its] rights to or use of the property." Pet. App. 17-18.[16]

The court of appeals attempted to distinguish *Fagot Rodriguez* and *MacArthur Area Citizens* on their facts, observing that, unlike this case, no ongoing property dispute existed at the time the courts of appeals ruled. See Pet. App. 19 n.14. That distinction is not persuasive. In each case, the court made clear that jurisdiction would have been appropriate only if the plaintiff had made some claim *to the property itself*. See *Fagot Rodriguez*, 297 F.3d at 13 (rental disputes "unaccompanied by issues of ownership, possession, or use" are not within the exception); *MacArthur Area Citizens*, 809 F.2d at 921 (emphasizing that plaintiff "makes no claim to any interest in that property"). Thus, the supposed distinction advanced by

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[16] In *Asociacion de Reclamantes*, the District of Columbia Circuit held that claims arising out of the alleged taking and conversion of certain land grants did not fall within the exception. 735 F.2d at 1522-1524. The court stated in dictum that an interpretation of Section 1605(a)(4) as limited to disputes directly implicating property interests or rights to possession was consistent with the district court's decision in *Government of the German Democratic Republic*, discussed above. *Id.* at 1522.

the court below is merely a feature of happenstance, not a distinction of jurisdictional significance.

2. The court of appeals disavowed reliance on the fact that respondent seeks in this litigation to establish the validity of a tax lien. See Pet. App. 21 n.16 (respondent's tax lien "is irrelevant to our analysis"). Rather, the court claimed broad jurisdiction to adjudicate "the extent of defendants' obligations under local law (here, property taxes) arising directly out of their ownership of real property in the United States." *Id.* at 21. In this Court, however, respondent seeks (Br. in Opp. 15) to defend the judgment below on the ground that its claim of a tax lien constitutes a "right in immovable property" within the scope of Section 1605(a)(4). That contention fails because a statutory tax lien is not a "right in" property, and jurisdiction on that basis would improperly circumvent the FSIA's prohibition on pre-judgment attachment as a means of obtaining jurisdiction over a foreign state.

a. Section 1605(a)(4) is limited to cases in which "rights in immovable property * * * are in issue." As this Court has recognized, a lien does not itself establish any property right, but is "merely a means to the end of satisfying a claim for the recovery of money." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 262 (1999); see *Ward* v. *Chamberlain*, 67 U.S. (2 Black) 430, 437 (1863) ("a lien on land constitutes no property or right in the land itself"); *Weinstein* v. *Taylor*, 234 N.Y.S.2d 926, 926 (Sup. Ct. 1962) (tax lien is not an "estate or interest in real property") (quoting *Leonard* v. *Schwartz*, 100 N.Y.S.2d 802, 803 (App. Div. 1950)), aff'd, 242 N.Y.S.2d 707 (App. Div. 1963); 5 Restatement (First) of the Law of Property § 540 cmt. a, at 3238 (1944) (First Restatement) ("the lien constitutes merely additional security for the performance of the promise"); see also *Massingill* v. *Downs*, 48 U.S. (7 How.) 760, 767 (1849) ("A judgment lien on land constitutes no property or right in the land itself," but "only confers a right to

levy on the same, to the exclusion of other adverse interests subsequent to the judgment") (quoting *Conard* v. *Atlantic Ins. Co.*, 26 U.S. (7 Pet.) 386, 443 (1828) (Story, J.)); *Conard*, 26 U.S. at 443 (same); 5 Richard R. Powell, *Powell on Real Property* § 38.02[2], at 38-7 (Mar. 1996) (judgment lien "is not an estate in the debtor's land").[17]

In support of its argument that Section 1605(a)(4) encompasses tax liens, respondent cites (Br. in Opp. 15 n.16), as did the court of appeals (Pet. App. 10-11), a reference in the legislative history of Section 1605(a)(4) to "questions of ownership, rent, servitudes, and similar matters," H.R. Rep. No. 1487, 94th Cong., 2d Sess. 20 (1976). It is far from clear that the House Report reference to "rent" signifies an intent to expand the preexisting real property exception to include, for example, a new category encompassing all monetary claims relating to real property. See *Fagot Rodriguez*, 297 F.3d at 11 (rejecting non-possessory claim for back rent); *Asociacion de Reclamantes*, 735 F.2d at 1522 n.5. Moreover, the extensive diplomatic consequences for the United States, host of, *inter alia*, the United Nations and Organization of American States, that would flow from a significant expansion of the property exception would surely need to rest on a firmer foundation than a single reference in a House Report. In any event, the quoted language does not encompass an action to establish the validity of a lien, which is not "rent," a "servitude[ ]," or "similar matter."

Early common law did not even recognize a lien on land. 5 Herbert Thorndike Tiffany, *The Law of Real Property* § 1559, at 650 (3d ed. 1939). It also distinguished clearly be-

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[17] That is not to say that a lien is not itself "property," but only that it is not among the "rights in immovable property" specified in 28 U.S.C. 1605(a)(4). Cf. *United States* v. *Whiting Pools, Inc.*, 462 U.S. 198, 204 (1983) (noting that debtor's property subject to tax lien was part of debtor's estate, and that holder of tax lien could not resort to the "remedy of possession").

tween a lien and a servitude (or "servient tenement"), the latter constituting a direct interference with the ownership, possession, or use of one's land. See 3 Tiffany §§ 756, 758, at 200-201, 203-204; see also 5 First Restatement of Property § 450 & cmt. a, § 455, at 2901-2903, 2919. A lien is different in important respects from rights in immovable property such as covenants, easements, or servitudes. For example, an order to sell property in bankruptcy free and clear of all liens, claims, encumbrances, and rights "does not indicate that the property is to be sold free and clear of non-monetary restrictions of record which run with the land," such as servitudes. *In re Oyster Bay Cove, Ltd.*, 161 B.R. 338, 343 (Bankr. E.D.N.Y. 1994), aff'd 196 B.R. 251 (E.D.N.Y. 1996).

Enforcement of a lien is also quite different from enforcement of a servitude or other right in property. Whereas a person suing for title, possession, or enforcement of a servitude seeks an immediate interest in the property itself, a lien holder's primary claim is to the payment of a debt. The lien uses real property as leverage, but it does not amount to an interest in the real property itself. Under New York law, for example, the property owner "has a right to redeem at any time before an actual sale under a judgment of foreclosure." *NYCTL 1996-1 Trust* v. *LFJ Realty Corp.*, 763 N.Y.S.2d 836, 837 (App. Div. 2003) (quoting *United Capital Corp.* v. *183 Lorraine St. Assocs.*, 675 N.Y.S.2d 543, 543-544 (App. Div. 1998)).

In sum, the lien provides a mechanism by which the lienholder can secure payment, but it is not itself a right in real property. Especially in light of the historical origins of the immovable property exception, it is clear that a lien is not a "similar matter" to ownership of property, servitudes on the

land, and even rents.[18] It is one thing to ensure that foreign sovereign immunity does not prevent adjudication of title and covenants in real property—matters at the heart of the domestic sovereign's "primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Asociacion de Reclamantes*, 735 F.2d at 1521. It is quite another to expand the exception to cover debt collection efforts that attempt to use the property as a security.[19]

b. Respondent's reliance on the existence of a statutory tax lien against petitioners' property as the basis of the court's jurisdiction would also be inconsistent with the FSIA's elimination of the prior practice of obtaining jurisdiction over a foreign state through attachment of its property. See H.R. Rep. No. 1487, *supra*, at 26-27 (FSIA was intended to end the practice of permitting "an attachment for the purpose of obtaining jurisdiction over a foreign state or its property"). The FSIA explicitly prohibits pre-judgment attachment as a means of establishing jurisdiction, see 28 U.S.C. 1609,

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[18] Indeed, in some states, a statutory tax lien on real property arises from unpaid taxes on *personal* property. See 5 Powell § 39.04[2], at 39-39 (June 2004). New York law creates many other liens related to real property, including an emergency repair lien; relocation lien; pest control lien; housing violations and civil penalty lien; canopy lien; leaking tap lien; building inspection fees lien; sidewalk repair lien; and environmental control board lien. See Melvyn Mitzner, *Liens and Encumbrances, in Real Estate Titles* 301, 311-314 (James M. Pedowitz ed., 1984). In fact, it appears that some of the monies sought to be recovered from the Permanent Mission of India involve sidewalk repair charges and elevator taxes. Surely Congress did not intend to abrogate immunity with respect to this broad array of municipal claims by its reference to "rights in immovable property" in Section 1605(a)(4).

[19] In the United States' experience, when taxes are assessed against properties that are indisputably subject to taxation, foreign governments generally pay those taxes. Where, however, a dispute arises as to whether international law permits a certain property to be taxed, the dispute is appropriately resolved through diplomatic means, rather than litigation in the courts of one state or the other.

1610(d)(2), and provides that a district court has *in personam* jurisdiction over the foreign state for any claim that falls within a statutory exception to immunity.[20] Indeed, the FSIA significantly limits the measures of restraint against sovereign property that a court can impose even in the event of a judgment. See 28 U.S.C. 1610(a)(4)(B); 28 U.S.C. 1610(a).[21]

Permitting jurisdiction over a foreign state by virtue of the existence of a statutory restriction on the property is not consistent with Congress' intent to eliminate *quasi in rem* jurisdiction based on pre-judgment attachment in favor of *in personam* jurisdiction over the foreign state. A city cannot,

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[20] Notably, the only FSIA provision pertaining to liens, the exception from immunity for a suit in admiralty to enforce a commercial maritime lien, converts the claim into an *in personam* action against the foreign state and does not allow arrest of the vessel. 28 U.S.C. 1605(b); H.R. Rep. No. 1487, *supra*, at 21-22.

[21] The FSIA provides that a foreign state's property "shall be immune from attachment[,] arrest and execution except as provided in sections 1610 and 1611 of this chapter," 28 U.S.C. 1609, and further provides that "[n]o attachment or execution" that the statute otherwise allows "shall be permitted until the court has ordered such attachment and execution * * * following the entry of judgment," 28 U.S.C. 1610(c), with certain exceptions relating to commercial property, 28 U.S.C. 1610(d). As explained in the text, the pre-judgment lien claimed by respondent in this case, which assertedly was imposed against petitioners' property by operation of state law, not court order, could not itself furnish a basis for jurisdiction of this action. The underlying validity of that asserted lien is not before the Court. Compare *Republic of Argentina*, 250 N.E.2d at 702 ("imposition of a lien * * * would constitute an impermissible exercise of jurisdiction over another state's property"), and *United States* v. *Ausonia Brass & Copper Co.*, 218 U.S. 452, 471 (1910) (noting the common law prohibition on "contractors for labor and material to take liens upon the public property of the United States"), with 28 U.S.C. 1604 (FSIA confers immunity from 'the jurisdiction of the courts"). If a non-judicial lien was imposed on a foreign state's property that it regarded as improper, its only remedies would be to sue to have the lien declared invalid, which could open it to counterclaims as to which it would otherwise be immune, see 28 U.S.C. 1607, or to request the United States to sue on its behalf, see *City of Glen Cove*, *supra*.

through the mere statutory declaration of a lien or other self-help measure, create jurisdiction over a foreign state.

D. International Conventions On State Immunity Exclude Claims For Unpaid Property Taxes Or A Tax Lien

1. Courts have routinely recognized the propriety of consulting international practice at the time of the Act's passage in construing the FSIA's provisions. See *Asociacion de Reclamantes*, 735 F.2d at 1521 ("[t]he immovable property exception [in Section 1605(a)(4)] was enacted to codify * * * the pre-existing real property exception recognized in international practice"). One of the two international conventions discussed in the legislative history of the FSIA is the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. The United States is a party to that Convention, and the House Report on the FSIA specifically indicated that Section 1605(a)(4)'s immovable property exception was consistent with the Convention. See H.R. Rep. No. 1487, *supra*, at 20. Thus, the Vienna Convention's real action exception is relevant in construing Section 1605(a)(4).[22]

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[22] The House Report cites the Vienna Convention in the course of explaining that the scope of Section 1605(a)(4) was consistent with the Tate Letter's statement that "diplomatic and consular property" was "excepted" from the real property rule. The Report states that the Tate Letter referred only to "attachment" of or "execution" against diplomatic property, and then observes that the Vienna Convention would permit adjudication of "questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed." H.R. Rep. No. 1487, *supra*, at 20. The report does not specify whether its reference to "rent" refers only to some subset of rent claims, such as "those rent suits in which title is in dispute," as one court has hypothesized, *Asociacion de Reclamantes*, 735 F.2d at 1522 n.5, but it is in any event immaterial to this suit, which does not involve a claim for rent. Notably, the FSIA includes a separate exception for claims based on commercial activity, which would include rental agreements. Separate provisions would bar any attempt to attach or execute against foreign state prop-

The Vienna Convention contains an analogous exception to the immunity of diplomatic agents for "a *real action* relating to private immovable property situated in the territory of the receiving State, unless [the agent] holds it on behalf of the sending State for the purposes of the mission." Art. 31(a), 23 U.S.T. at 3240, 500 U.N.T.S. at 112 (emphasis added). The term "a real action" encompasses actions for "a declaration of title" or "an order for possession," but excludes "actions for recovery of rent or performance of other obligations deriving from ownership or possession of immovable property." Denza 238. These types of claims parallel the limited universe of claims that fall within the traditional real property exception. Thus, the Vienna Convention confirms the narrow meaning of Section 1605(a)(4).

2. The court of appeals based its construction of Section 1605(a)(4) on the broadly-phrased real property exceptions contained in two other international conventions. The United States is not a party to those conventions. And those conventions cannot be used, as the court of appeals did, to trump the text of the FSIA itself, especially when the conventions depart from customary practice. In any event, the court of appeals' interpretation of those conventions was in error. Neither encompasses a claim for unpaid taxes or based on a tax lien on real property owned by a foreign state and used for governmental purposes.

The court of appeals construed the phrase "rights in immovable property" to encompass all "obligations arising directly out of such rights to or use of the property," including "obligations * * * imposed by the local government as part of its property law regime," Pet. App. 17-18 & n.13. As explained above (see pp. 7-17, *supra*), that interpretation cannot

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erty used for governmental purposes based on a judgment under that exception. See 28 U.S.C. 1609-1611.

be squared with the text or historical background of Section 1605(a)(4). The court of appeals nonetheless ascribed that broad meaning to Section 1605(a)(4) because the European Convention, which the FSIA House Report also cites, includes a broad exception to that effect. But that broad exception is expressed in very different terms from the narrow exception of Section 1605(a)(4). In contrast to the FSIA, Article 9(b) of the European Convention expressly abrogates immunity for suits involving "obligations arising out of [a state's] rights or interests in, or use or possession of, immovable property." 1495 U.N.T.S. at 184; see Pet. App. 13. Article 13(a) of the U.N. Convention (which is not in force and which the United States did not sign) similarly provides an explicit exception to immunity for cases involving "any obligation of the State arising out of its interest in, or its possession or use of, immovable property." 44 I.L.M. at 808; see Pet. App. 14 n.9. Tellingly, the European and U.N. Conventions list that broader class of suits *separately* from the exception both conventions also include for proceedings relating to "rights or interests in, or its use or possession of, immovable property," European Convention, art. 9(a), 1495 U.N.T.S. at 184; U.N. Convention, art. 13(a), 44 I.L.M. at 808. That narrower exception more closely approximates the language of Section 1605(a)(4) and reinforces Section 1605(a)(4)'s narrow scope. The court of appeals erred in reading into the FSIA a separate and broader immunity exception from the European and U.N. Conventions that Congress omitted.

In any event, the court of appeals' interpretation of even the broader exception included in the European and U.N. Conventions was erroneous. Those conventions in fact do not abrogate immunity in cases to recover property taxes imposed on—or to declare a tax lien on—foreign governmental property. Article 29(c) of the European Convention explicitly *excludes* proceedings concerning "[c]ustoms duties, taxes or

penalties" from its coverage. 1495 U.N.T.S. at 190. Such claims involving public law disputes between states are outside the scope of the Convention, which "is essentially concerned with 'private law' disputes between individuals and States." Council of Europe, *European Convention on State Immunity: Explanatory Report* ¶ 113 (last visited Feb. 28, 2007) <http://conventions.coe.int/treaty/en/Reports/HTML/074.htm>. Similarly, although the International Law Commission initially included in the draft U.N. Convention both an immovable property exception and a provision waiving immunity for suits to collect taxes on real property used for commercial purposes,[23] the tax exception was subsequently deleted, with the explanation that it addressed state-to-state relations rather than the types of disputes between states and private persons that the Convention was intended to govern. See *Summary Records of the 2220th Meeting*, [1991] 1 Y.B. Int'l L. Comm'n 84 (¶ 6), U.N. Doc. A/CN.4/SER.A/CN.4/SER.A/1991. The clear implication is that the drafters of the U.N. Convention did not understand property tax claims to fall within that Convention's immovable property exception.[24]

In sum, the court of appeals broadened the exception provided Section 1605(a)(4) in order to make it consistent with the European and U.N. Conventions, despite their diverging

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[23] See *Sixth Report on Jurisdictional Immunities of States and Their Property*, Sompong Sucharitkul, Special Rapporteur, at 21-25, U.N. Doc. A/CN.4/376 (1984) (Art. 17) <http://untreaty.un.org/ilc/documentation/english/a_cn4_376.pdf>.

[24] The United Kingdom's State Immunity Act, 1978, 17 I.L.M. 1123 (1978), has a real property exception nearly verbatim to the European Convention's. *Id.* at 1125 (§ 6(1)(b)). Significantly, it has a *separate* exception for tax claims that, with respect to real property, is limited to premises occupied by the foreign sovereign "for commercial purposes." *Id.* at 1126 (§ 11(b)). Apart from Section 11, the "Act does not apply to any proceedings relating to taxation." *Id.* at 1127 (§ 16(5)).

texts. In so doing, however, the court of appeals created an exception for tax claims that is not provided by either of those conventions. The conventions, properly understood, reflect the understanding of their drafters that, even under the restrictive theory of immunity, the longstanding exception to immunity for suits involving rights in immovable property does not subject a foreign sovereign to suit on a state-to-state dispute over whether property is subject to taxation.[25]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[25] The court of appeals erroneously relied on appropriations laws enacted by Congress in 2004 and 2005 in construing the FSIA's immovable property exception. See Pet. App. 11-12. Those laws provide for the deduction from foreign aid to a country of an amount "equal to 110 percent of the * * * unpaid property taxes owed by the central government of such country" to New York City or the District of Columbia, as determined "in a court order or judgment entered against such country by a court of the United States." Act of Nov. 14, 2005, Pub. L. No. 109-102, § 543(a) and (f)(4), 119 Stat. 2214, 2215; Act of Dec. 8, 2004, Pub. L. No. 108-447, Div. D, § 543(a) and (f)(4), 118 Stat. 3011, 3012. The fact that Congress has provided a mechanism for fulfilling judgments in the event they are rendered says nothing about whether Section 1605(a)(4), enacted 30 years earlier, confers jurisdiction over such claims. Moreover, contrary to the court of appeals' understanding, petitioners' construction of the immovable property exception would not "make dead letters" of the more recent laws. Pet. App. 12. Neither refers to the immovable property exception, and each could be given full effect as to a judgment rendered pursuant to Section 1605(a)(1) (waiver of immunity), or in a suit brought *by* a foreign state, *e.g.*, *Republic of Argentina* v. *City of New York* *supra*.

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In the Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS, ET AL.,

Petitioners,

v.

CITY OF NEW YORK

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amici will address the following question:

Whether United States courts have jurisdiction under the Foreign Sovereign Immunities Act of 1976 to declare the validity of a tax lien held by a municipal authority for unpaid property taxes imposed on property owned by a foreign nation.

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CASES

Asociation de Reclamantes v. *United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984) 4, 8, 22

City of Englewood v. *Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985)..... *passim*

City of New Rochelle v. *Republic of Ghana, Republic of Indonesia, and Republic of Liberia*, 255 N.Y.S.2d 178 (County Ct. 1964)..... 18, 20

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INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 3

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Mallard v. *United States Dist. Court*, 490 U.S. 296 (1989) 3

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Republic of Austria v. *Altmann*, 541 U.S. 677 (2004)..... 3

Roby v. *Baker*, 432 N.Y.S.2d 917 (3d Dept. 1980)..... 7

United States v. *Curtiss-Wright Export Co.*, 299 U.S. 304 (1936) 9

Verlinden B.V. v. *Central Bank of Nigeria*, 461 U.S. 480 (1983) 17

Weilamann v. *Chase Manhattan Bank*, 192 N.Y.S.2d 469 (Sup. Ct. N.Y. 1959)..... 20

TREATIES, STATUTES, RULES AND REGULATIONS

Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004) 28

European Convention on State Immunity, *done* May 16, 1972, 1495 U.N.T.S. 181 ..... 4, 7, 15, 16

TABLE OF AUTHORITIES—continued

Page(s)

Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005) 28

Foreign States Immunities Act, No. 196 (1985) (Austl.), reprinted in Andrew Dickinson et al., eds., State Immunity: Selected Materials and Commentary 469-87 (2004) 24

Foreign States Immunities Regulation, No. 77 (as amended) (1987) (Austl.), available at: http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/87C39DB5671D39CCCA256F8F00181874/$file/1996B00775.pdf. 24

Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1602 *et seq.* ..... *passim*

Immunity of Foreign States from the Jurisdiction of Argentinean Courts, Law No. 24, 488 (1995) (Arg.), reprinted in Andrew Dickinson et al., eds., State Immunity: Selected Materials and Commentary, at 465-68 (2004) 24

International Law Association Revised Draft Articles for a Convention on State Immunity (Buenos Aires, 14-20 August 1994), Article III(D), reprinted in Andrew Dickinson et al., at 196 27

L'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiciton and Enforcment (Basle, 2 September 1991), reprinted in Andrew Dickinson et al., at 206-211 ..... 26, 27

New York City Charter § 1519(2) 6

TABLE OF AUTHORITIES—continued

Page(s)

Organization of the American States, Inter-American Draft Convention on Jurisdictional Immunities of States, Articles 5 and 6, reprinted in Andrew Dickinson et al., at 201-02 27

Restatement (Third) of Foreign Relations Law of the United States (1986) 21, 22

Restatement (Third) of Foreign Relations Law of the United States, Tentative Draft No. 6, Volume 1 (April 12, 1985) 22

State Immunity Act (1978) (U.K.), reprinted with commentary in Andrew Dickinson et al., eds., State Immunity: Selected Materials and Commentary 329-442 (2004) 24, 25

State Immunity Act, Ch. 313 (revised version 1985) (Sing.), reprinted in Andrew Dickinson et al., eds., State Immunity: Selected Materials and Commentary 504-12 (2004) 24

State Immunity Ordinance, No. VI (1981) (Pak.), reprinted in Andrew Dickinson et al., eds., State Immunity: Selected Materials and Commentary, 496-503 (2004) 25

United Nations Convention on Jurisdictional Immunities of States and Their Properties, *opened for signature* Jan. 17, 2005, 44 I.L.M. 803 (2005) 23

Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 ..... 10, 14, 19

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS:

American Law Institute, Proposed Revision and Expansion of the Restatement of the Foreign Relations Law of the United States, Background and Description of the Project (Nov. 1977) 21

Black's Law Dictionary 941 (8th ed. 1999) 6

Explanatory Report of the European Convention on State Immunity, ETS No. 74 ..... 16, 17

Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 94th Cong., 2nd Sess., (June 2 and 4, 1976) ..... *passim*

Hearing before the Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., (June 7, 1973) ..... *passim*

House Report No. 1487, 94th Cong., 2d. Sess. ..... *passim*

Joseph S. Sweeney, The International Law of Sovereign Immunity, U.S. Department of State, Bureau of Intelligence and Research (October 1963) 12

Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Phillip B. Perlman, Acting Att'y Gen. (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-715 (1976) 12

Stephen McCaffrey, *Current Development: The Thirty-Fifth Session of the International Law Commission*, 78 A.J.I.L. 457 (1984) 24

Powell & Rohan, *The Law of Real Property* (1954) 6

TABLE OF AUTHORITIES—continued

Page(s)

Sixth Report on Jurisdictional Immunities of States and Their Property, Sompong Sucharitkul, Special Rapporteur, U.N. Doc. A/CN.4/376 (1984) 24

State Department Note, No. 44 (June 8, 1964), Michael Sandler et al., eds., Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977, reprinted in John A. Boyd, Digest of United States Practice in International Law 1977, 1050 (Jan. 1979) 19

David P. Stewart, *The U.N. Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194 (2005) 24

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 1,400 members. The membership is comprised of local government entities, including cities and counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. Since its establishment in 1935, IMLA has advocated for the rights and privileges of local governments and the attorneys who represent them through its Legal Advocacy Program. IMLA has appeared as *amicus curiae* on behalf of its members before the United States Supreme Court, in the United States Courts of Appeals, and in state supreme and appellate courts.

Amicus U.S. Conference of Mayors ("USCM") represents more than 1,100 cities with populations of 30,000 or more. USCM promotes the development of effective urban policy, strengthens federal-city relationships, and creates a forum in which mayors can share ideas and information. It also represents urban interests in litigation and has often appeared as an *amicus curiae* in this Court

The question presented in this case directly affects the operation of local governments because of their significant reliance on property taxation as a source of municipal funding. Because IMLA and the USCM have unique expertise with respect to these issues as well as a strong interest in their

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

appropriate resolution, *amici* submit this brief to assist the Court in the resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, in 1976. The Act advances two principal goals: it aligns United States practice on sovereign immunity with what Congress understood to be the then-prevailing practice among other nations; and it "transfer[s] the determination of sovereign immunity from the executive branch to the judicial branch," thereby ensuring that such decisions are made "on purely legal grounds" and are untainted by political considerations.[2] The only issue in this case is how Section 1605(a)(4) of the Act, which excepts suits involving immovable property owned by foreign states from FSIA's general grant of sovereign immunity, should be construed in light of these goals.

Resolving this question does *not* require the Court to give any formal weight to foreign practice or international law. Nothing in the question at issue or in the judgment of the court below even remotely implies otherwise. Rather, the Second Circuit properly recognized that such sources are relevant only insofar as they provide useful guidance on what Congress expected or intended when it enacted FSIA, since one of the Act's goals was to conform U.S. sovereign immunity standards to then-prevailing international practice. Nor does this case require the Court to defer to the Executive Branch's interpretation of FSIA. A key purpose of the Act was to "eliminate the peculiar and * * * outdated practice of having a political institution, namely, the State Department,

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[2] House Report No. 1487, 94th Cong., 2d. Sess., 7, reprinted in William H. Manz, ed., Foreign Sovereign Immunities Act of 1976, with Amendments: A Legislative History of Pub. L. No. 94-583 [hereinafter "House Report"].

decide many of these questions of law,"[3] and hence to transform issues of immunity into "pure question[s] of statutory interpretation" that are "well within the province of the Judiciary." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 701 (2004) (citing *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987).

Indeed, if anything warrants deference here, it is the State Department's longstanding view – in the years leading up to FSIA's enactment and beyond – that the immovable property exception provides United States courts jurisdiction to declare the validity of property tax liens. As the United States' *amicus* brief in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985) stated, "Congress never intended that the principle of sovereign immunity should permit foreign governments to ignore their [property tax] obligations to state and local communities." U.S. *Englewood* Br. 3. That representation, made much closer in time to the passage of FSIA than the United States' submission in this case, was correct.

Relying on appropriate sources of meaning, the identity and relative importance of which has been recognized repeatedly by the Court in this context, it is clear that the judgment below should be affirmed.

I. First in importance is the text of FSIA itself. See, *e.g.*, *Mallard v. United States Dist. Court*, 490 U.S. 296, 300-01 (1989). The language of Section 1605(a)(4) contains no limitation, denying immunity "in any case * * * in which * * * rights in immovable property are in issue." This text does not hinge anything on *whose* "rights" must be "at issue." In this

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[3] Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 94th Cong., 2nd Sess., (June 2 and 4, 1976), 25, reprinted in William H. Manz, ed., Foreign Sovereign Immunities Act of 1976, with Amendments: A Legislative History of Pub. L. No. 94-583 [hereinafter Hearings (1976)].

case, both New York City (through its statutory tax lien on the properties) and the nations of India and Mongolia (through their ownership of the property) have rights at stake in the litigation. As a result, this suit falls within the plain terms of FSIA's immovable property exception to sovereign immunity and should proceed to a hearing on the merits.

II. Next in importance are contemporaneous materials relied upon by Congress when it enacted FSIA. See, *e.g.*, *Asociation de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1521-22 (D.C. Cir. 1984) (Scalia, J.) (utilizing contemporaneous sources available to Congress, including treatises, international practice, and domestic U.S. materials, to help interpret Section 1605(a)(4)). At the time, Congress anticipated that FSIA would bring the United States into line with international law and practice; it also had a specific understanding concerning the meaning and scope of the immovable property exception. Both sets of expectations are relevant to this case.

Four key facts emerge from the legislative materials. First is the universal and well-documented understanding that FSIA was understood to embrace the restrictive theory of sovereign immunity, both generally and with respect to the immovable property exception. Second is the broad understanding of Section 1605(a)(4) held both by Congress and by the State and Justice Departments, whose officials not only drafted the Act but also were relied upon by Congress for their considerable knowledge of the state of existing international practice. Third is evidence showing that Congress believed FSIA would mirror the European Convention on State Immunity ("EC"), which also contains a broad immovable property exception. And fourth are the State Department's explicit indications to Congress that FSIA would be consistent with existing U.S. practice, which did not recognize general immunity for foreign states against suits involving liens for unpaid property taxes.

III. The final source of evidence bearing on the original meaning of FSIA is the subsequent practice of the United State and other nations. While that practice post-dates FSIA's enactment, it nonetheless sheds light on how the Act was originally understood because there is no evidence suggesting that the fundamental understanding of the Act, or of the international law of sovereign immunity more generally, has changed since 1976.

Domestic and international practice since 1976 clearly reflect the historical *continuity* of providing United States courts jurisdiction to enforce the tax obligations of foreign states. For example, the Third Restatement of U.S. Foreign Relations not only makes clear that FSIA's immovable property exception extends to suits for unpaid taxes, but also confirms that this result follows from the restrictive theory of sovereign immunity, which the Act was intended to broadly codify. Likewise, in *Englewood*, the first major case addressing the precise issue presented here, the United States' *amicus* brief argued that the *original understanding* of FSIA did not preclude local municipalities from suing foreign states for failure to pay property taxes. Other post-enactment evidence consistent with this understanding includes recent congressional statutes and the acceptance of a broad immovable property exception in numerous foreign statutes and international covenants.

ARGUMENT

I. THE TEXT OF FSIA PLAINLY ENCOMPASSES SUITS TO DETERMINE THE VALIDITY OF TAX LIENS.

The text is the starting point for interpreting FSIA's immovable property exception. Section 1605(a)(4) provides that a foreign state shall not be immune in "any case in which rights in immovable property situated in the United States are in issue." Because the text does not modify or condition the "rights" that must be in issue, the exception by its plain terms

encompasses all rights held by *anyone* in the disputed property – including those held by municipalities against properties with outstanding tax liabilities.

In common parlance, disputes involving tax liens involve just such rights in immovable property – and were understood to do so at the time of FSIA's enactment. In general, a lien is a "legal right or interest[] * * * in another's property." Black's Law Dictionary 941 (8th ed. 1999). State law defines the specific contours of rights in property, and in New York a lien on realty is defined as "a possessory right in the encumbered property with a concomitant right to sell that property if the debt is not satisfied." 75 N.Y. Jur.2d, *Liens* § 5, at 138. Like other encumbrances on real property, New York City tax liens run with the land and are perpetual in duration. New York City Charter § 1519(2). And as respondent convincingly shows, tax liens are widely recognized by courts, legislatures, and commentators as rights in real property.

The United States used to agree that there is "substantial authority to support the proposition that a tax lien * * * conveys upon its holder an interest in the land which is subject to the lien." U.S. *Englewood* Br. 11; see *ibid.* (stating that a lien constitutes an interest in the debtor's land that deserves substantial protection) (citing Powell & Rohan, *The Law of Real Property* § 477 (1954)). In its *Englewood* filing, the United States accordingly argued that a "narrow definition of rights" excluding an interest in tax liens – the definition for which it now contends – was "inconsistent with principles of real property law, at least with respect to tax liens," relying for this proposition on multiple authorities that existed prior to the passage of FSIA in 1976.

The United States used these contemporaneous authorities to highlight four examples where "courts and legislatures have held that liens are rights in the property which is subject to the lien." U.S. *Englewood* Br. 11. First, the holder of a tax lien may bring an action against the taxpayer to enjoin

"waste" of the land, which typically is a suit that may be brought only by parties with a right or interest in the property. *Id.* at 12 (citing 85 C.J.S. *Taxation* § 901 (1955)). Second, "holders of tax liens are entitled to compensation when the government exercises its power of eminent domain and condemns the underlying property." *Ibid.* (citing 29A C.J.S. *Eminent Domain* § 200 (1955)). Third, "a tax lien is not extinguished when a delinquent taxpayer sells the land to innocent third parties." *Ibid.* (citing *Roby v. Baker*, 432 N.Y.S.2d 917 (3d Dept. 1980)). And fourth, the Uniform Commercial Code "implicitly recognized that liens are property interests in the property to which the lien is attached," because under the U.C.C.'s definition of the word "purchase," "acquisition of a lien creates an interest in the underlying property." *Id.* at 12-13.

The United States was right then and is wrong now: its cramped new reading of FSIA's language – which maintains that the immovable property exception is limited to the adjudications of the *foreign sovereign's* right to title, possession, or ownership – finds no support in the text. On this point, it is instructive to look at the "rights" language of the EC's immovable property exception, which expressly *does* abrogate immunity only when the *foreign sovereign's* property rights or obligations are in issue. Article 9 of the EC provides: "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if the proceedings relate to – *its* rights or interests in, or *its* use or possession of, immovable property; or *its* obligations arising out of *its* rights or interests in, or use or possession of, immovable property." EC, Art. 9 (emphasis added). In contrast, the use of the word "its" to modify rights in property is conspicuously absent from FSIA. That Congress was aware of and chose not to replicate the EC's language indicates a desire to make

FSIA's immovable property exception apply whenever rights, in general, are in issue.[4]

Therefore, the appropriate inference from the plain text of FSIA is that Congress intended to let United States courts adjudicate cases whenever either party to the litigation possesses a right in immovable property located in the United States. Because Congress understood from contemporaneous law and practice that tax liens were rights in property, and because FSIA does not explicitly exempt tax liens from the immovable property exception, there is no immunity with respect to tax disputes.

II. CONGRESS ENACTED FSIA RELYING ON CONTEMPORANEOUS MATERIALS MAKING CLEAR THAT THE IMMOVABLE PROPERTY EXCEPTION INCLUDES DISPUTES OVER PROPERTY TAXES.

The plain meaning of FSIA's text is confirmed by the legislative background. To the extent that they were available for congressional inspection – and were explicitly presented to Congress during the drafting process – materials bearing on prevailing international practice furnish powerful evidence of congressional intent, given Congress's manifest goal to conform U.S. sovereign immunity law with international practice. See *Reclamantes,* 735 F.2d at 1521 (Scalia, J.).

The Court should place particular weight on representations that the State and Justice Departments made to Con-

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[4] Congress' omission of the limiting term "its" from FSIA made it unnecessary for Congress to borrow the EC's "obligations" language. In FSIA, a separate obligations prong would have been superfluous because in cases where a foreign sovereign has obligations arising out of its ownership of property (such as tax liability), another party (such as the taxing authority) necessarily has attendant rights in that property, sufficient to provide jurisdiction under FSIA.

gress on this issue. Understandably in need of expert guidance on how to bring the United States into conformity with international law and practice, Congress consulted with and placed great reliance on the Executive Branch – "the sole organ of the federal government in the field of international relations." *United States* v. *Curtiss-Wright Export Co.*, 299 U.S. 304, 320 (1936). Indeed, the Departments of State and Justice played a key role in drafting FSIA, and furnished the initial version of the explanatory section-by-section commentary contained in the House and Senate Reports.[5] In addition, senior State and Justice Department officials twice testified before Congress – once in 1973 when the initial version of FSIA was first proposed, and again in 1976 after an amended version was re-introduced – to explain the meaning of specific provisions and the ways in which these provisions fit into the international legal regime. Hearings (1973) at 14-33; Hearings (1976) at 24-54.

The representations made by the Executive Branch and other contemporaneous materials bearing on international practice provide powerful support for the conclusion, evidenced in the statutory text, that Section 1605(a)(4) gives courts jurisdiction to determine the validity of tax liens on property owned by a foreign state.

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[5] Hearing before the Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary, House of Representatives, 93rd Cong., 1st Sess., (June 7, 1973), 33-48, reprinted in William H. Manz, ed., Foreign Sovereign Immunities Act of 1976, with Amendments: A Legislative History of Pub. L. No. 94-583 [hereinafter "Hearings (1973)"]. See also House Report at 6-33.

A. A Fundamental Goal Of FSIA Was To Codify The "Restrictive" Theory Of Sovereign Immunity, Which Denies Immunity In Cases Involving "Private" Acts Such As The Ownership Of Real Property.

There is no doubt that FSIA was passed in large part to codify the "restrictive" theory of sovereign immunity, which permits lawsuits in cases arising from a state's "private" acts.[6] And it is undisputed that ownership of non-diplomatic property is an example of such a private act. Given that the taxes at issue here were assessed on property used as private housing for staff-level employees – and not for the public purpose of maintaining an embassy or consulate, or housing the head of mission, as stipulated by the Vienna Convention[7] – the restrictive theory allows jurisdiction to be exercised in this case.[8]

The United States tries to avoid this conclusion by arguing that the immovable property exception pre-dates the restrictive theory, and hence should be read against the background of the absolute theory of sovereign immunity that prevailed prior to the Tate Letter. U.S. Br. 6, 9-11. Under this approach, the United States maintains, immunity should be denied only when there is a "necessity" that a sovereign "be able to determine all issues relating to the title and possession

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[6] See House Report 7-10, 14, 45; Hearings (1976) 25-27, 31.

[7] See Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (exempting states from taxes on the premises of the mission, defined as the parts of buildings used for the purposes of the mission, including the residence of the head of mission).

[8] To the extent there is a dispute here about whether the property at issue is tax-exempt diplomatic property, it should be resolved in the merits stage of the proceeding, under the standards established by the Vienna Convention. Cf. *Lance* v. *Coffman*, 127 S. Ct. 1194, 1196 (2007) ("Federal courts must determine that they have jurisdiction before proceeding to the merits").

of property within its realm." *Id.* at 6. The United States concludes that the absence of pre-FSIA suits adjudicating tax claims demonstrates that there is no such "necessity" for domestic courts to adjudicate suits for local property taxes. *Ibid.*

This novel theory has perverse implications; although the reasons for waiving immunity as to disputes involving real property were sufficiently compelling that they were recognized even when absolute foreign sovereign immunity otherwise prevailed, the United States now says that real property disputes should be viewed against the background of a uniquely *broad* background understanding of immunity. This approach finds no support in the text or legislative history of FSIA. Nowhere in the Act itself, the House or Senate reports, or the testimony of senior State and Justice Department officials is it suggested that FSIA's immovable property exception seeks to codify the understanding of the real property exception that prevailed under the outdated "absolute" theory, instead of the more modern "restrictive" approach to immunity.

On the contrary, the legislative materials show that Congress understood *all* provisions of FSIA to embrace the restrictive theory. As Bruno Ristau, Chief of the Foreign Litigation Section of the Justice Department's Civil Division, testified before Congress, "[t]he [FSIA] is designed to codify as a matter of Federal law the restrictive theory of sovereign immunity, and thus put to rest once and for all the question as to what doctrine of sovereign immunity the United States follows." Hearings (1976) at 31. And as State Department Legal Adviser Monroe Leigh further made clear, the "principles of international law" constituting the restrictive theory "are embodied in sections 1604 through 1607" – including, of course, the very Section 1605(a)(4) now at issue here. Hearings (1976) at 27.

In light of this contemporaneous evidence, there is no reason to accept the United States' contention that, unlike the

rest of FSIA, Section 1605(a)(4) should be read as though the rule of absolute immunity still prevailed. Such a reading flies in the face of the Act's central purpose – to formally break from the traditional approach and curtail state reliance on immunity in cases arising from private acts.

Moreover, even if the United States is right that the immovable property exception should be construed in accordance with the absolute theory, its conclusion is incorrect because it misstates the broad application of the real property exception that was applied even during the period when absolute immunity prevailed. Even at the time, as described in the Tate Letter, the exception was thought generally to allow suit "*with respect* to real property (diplomatic and perhaps consular property excepted)." House Report at 20 (emphasis added).[9] That understanding of the pre-Tate Letter real property exception, which was stated in terms broad enough to reach suits involving tax liens (suits that surely are "with respect" to real property) and which was familiar to Congress in 1976, cannot be squared with the United States' current position.

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[9] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Department of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), reprinted in *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 711-715 (1976). Further support for this understanding of the absolute theory can be found in a study commissioned by the State Department – and endorsed by its Legal Adviser – in 1963. See Joseph S. Sweeney, The International Law of Sovereign Immunity, cover page and 1, U.S. Department of State, Bureau of Intelligence and Research (October 1963).

B. Based on Representations By The Executive Branch, Congress Expected The Immovable Property Exception To Apply To Litigation "Relating To" Or "With Respect To" Immovable Property, Including Tax Obligations.

In both 1973 and 1976, officials from the State and Justice Departments made representations to Congress about the prevailing norms of international practice and suggested legislative language for FSIA's immovable property exception to reflect that practice. These representations strongly suggest that FSIA provides U.S. courts jurisdiction to determine the validity of tax liens on such property owned by foreign states.

In 1973, Secretary of State William P. Rogers and Attorney General Richard G. Kleindeist sent Congress an initial draft of FSIA with an immovable property exception identical to the final text of Section 1605(a)(4) enacted three years later. Hearings (1973) at 36. Along with the draft, Rogers and Kleindeist attached a section-by-section commentary giving interpretive guidance on the meaning of each provision. According to the commentary, Section 1605(a)(4) reaches "litigation *relating to* immovables and to the property of decedents." Hearings (1973) at 41 (emphasis added). The commentary went on to note that "a foreign state cannot deny to the local state the right to adjudicate on questions of ownership, *rent, servitudes, and other similar matters*, as long as the foreign state's possession of the premises is not disturbed." *Ibid.* (emphasis added). These broad formulations would appear to describe actions to establish the validity of tax liens on immovable property.

Testifying on behalf of the bill in 1973, State Department Acting Legal Adviser Charles Brower used similar language, confirming the broad scope of Section 1605(a)(4). He declared that the immovable property exception permitted litigation "against a foreign state *relating to* * * * rights in

immovable property situated in the United States." Hearings (1973) at 21. He went on to explain that "this is a pretty clear exception for estate and *real estate matters* in this country, in keeping with the law at the present time." *Ibid.* (emphasis added). Brower gave no indication that the exception applied only to the rights of foreign states or that the assessment of a property tax was not included within the general category of "real estate matters."

The House Report accompanying the final version of FSIA in 1976 endorsed this broad approach. The Report explains that Section 1605(a)(4) "denies immunity in litigation *relating to* rights in real estate * * * located in the United States." House Report at 20 (emphasis added). It goes on to note that, in accordance with the Tate Letter of 1952, "sovereign immunity should not be granted in actions *with respect* to real property, diplomatic and consular property excepted * * * . It does not matter whether a particular piece of property is used for commercial or public purposes." *Ibid.* (emphasis added). Moreover, in its discussion of the immovable property exception and its relationship to the Vienna Convention, the 1976 House Report reflected the Executive Branch commentary, noting that "a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes, and similar matters, as long as the foreign state's possession of the premises is not disturbed." House Report at 20.

This review of the contemporaneous sources shows that the discussion of Section 1605(a)(4) prior to FSIA's passage in 1976 uniformly endorsed the broad scope of the immovable property exception to sovereign immunity. Indeed, each of the formulations used by the House Report to explain the scope of that exception – "litigation relating to rights in real estate," "actions with respect to real property," the right of courts "to adjudicate questions of ownership, rent, servitudes, and similar matters" – is expansive enough to include disputes regarding tax liens and is significantly broader than the

reading now offered by the United States, which would limit the immovable property exception to suits concerning only "ownership, use, or possession." U.S. Br. 8. Such a construction would narrow the exception's scope well beyond the general understanding that prevailed at the time FSIA was enacted.

C. The Executive Branch Made Clear To Congress That FSIA Was Consistent With International And Domestic Practice.

1. Congress Understood FSIA To Be Consistent With The European Convention, Which Contains A Similarly Broad Immovable Property Exception.

There is no dispute that one of Congress's principal goals in drafting FSIA was to align the United States' practice on sovereign immunity with that of other states. At the time FSIA was under consideration, the most ambitious international attempt to generate consensus on the law of sovereign immunity was the European Convention, which was completed in the years immediately preceding passage of FSIA. References to the EC in FSIA legislative materials indicate that both Congress and the Executive Branch believed the Act to be fully consistent and harmonious with the EC.[10] That is significant, because the EC strongly supports the conclusion that disputes concerning tax liens are permissible under FSIA.

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[10] See Hearings (1973) at 18 (testimony by State Department Acting Legal Adviser Charles Brower, discussing the general intent of FSIA's drafters to "conform fairly closely" to "accepted international standards" such as the EC); Hearings (1976) at 37 (Congressman George Danielson asked whether there was "any inconsistency" between the EC and the proposed FSIA, and Monroe Leigh, State Department Legal Adviser, replied: "[i]n general terms, no.").

As we note above, the EC waives immunity not only with respect to suits concerning a state's rights in property, but also when the suit concerns obligations arising out of state ownership of property. EC, Art. 9. The Explanatory Report to Article 9 notes that the terms "rights, use and possession" in the immovable property exception "must be interpreted broadly." Explanatory Report of the European Convention on State Immunity, ETS No. 74 ("Explanatory Report"), ¶ 44.[11] This understanding, with its express reference to state obligations, is flatly inconsistent with petitioners' and the United States' submission that the real property exception is generally understood to reach only disputes concerning a sovereign's rights to title or possession of property.

Petitioners and the United States seek to escape this conclusion by observing that the EC provides, in Article 29, that the Convention does not cover proceedings concerning "customs duties, taxes or penalties." U.S. Br. 28-29. But the United States draws precisely the wrong conclusion from this limitation. Article 29 does *not* give states immunity in tax disputes, as the United States implies. See U.S. Br. 19 n.15 (EC "does not permit adjudication of tax claims"); see also *id.* at 28-29 (EC "do[es] not abrogate immunity in cases to recover property taxes imposed on – or to declare a tax lien on – foreign governmental property"). Rather, Article 29 ensures that the EC neither grants nor denies immunity in tax cases; it limits *both* the broad grant of state immunity of Article 15 and the immovable property exception to that grant of immunity stipulated in Article 9.

Unlike FSIA, the EC is limited to issues of private law. Treatment of customs duties, taxes, penalties and fines was

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[11] The Explanatory Report was prepared by an expert committee and submitted to the Committee of Ministers of the Council of Europe. It was intended to provide useful but non-authoritative guidance as to how the Convention should be interpreted. See Explanatory Report, ¶ II.

omitted because, in many countries, such matters "d[id] not fall exclusively under public law or because the dividing line between public and private law [was] ill-defined or non-existent." Explanatory Report, ¶ 113. Because the EC was "essentially concerned with private law disputes between individuals and States," the drafters wanted to ensure that taxation disputes would not be drawn into Article 9's broad immovable property exception. See *ibid.* (stating that without Article 29, "Article 9 in particular might otherwise have been applicable" and waived immunity as to tax disputes).

It is important to realize, however, that Article 29 applies just as much to the general grant of immunity contained in Article 15 of the EC. Hence, the provision removes treatment of tax disputes from the Convention *altogether*, leaving such disputes open to "general rules of law." See Explanatory Report, ¶ 113. The EC thus does not take a position one way or the other on the issue of sovereign immunity for tax disputes, and member states of the Council of Europe may or may not be immune, depending upon the particular laws of each member country. This arrangement is workable because the EC supplements the laws of its member states; as background law, it leaves certain questions open to determination by individual States.

By contrast, FSIA covers the entire field of sovereign immunity law, and hence provides the "sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states." House Report at 12. The Court has stated its understanding of the Act in similar terms. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities"). And although Congress included in FSIA an immovable property exception as broad as the one in the EC, it chose *not* to limit that exception with language like that in the EC's Article 29. Because the EC's Article 9

would have covered tax liens without Article 29's specific exemption, and because Congress did not include such a public-law exemption to its equally broad immovable property exception, the clear inference is that Congress intended to give United States courts jurisdiction over such disputes.

2. The State Department Expressly Advised Congress That Existing U.S. Practice Did Not Grant Sovereign Immunity In Cases Involving Liens For Unpaid Property Taxes.

Other materials before Congress at the time it enacted FSIA point to the same conclusion. During Congress's consideration of the initial version of FSIA in 1973, the Executive Branch indicated that its practice was not to grant immunity to foreign states involved in suits for unpaid property taxes. Given Congress's understandable reliance on the Executive Branch to explain domestic application of sovereign immunity principles and its consequences for FSIA, this representation strongly supports the inference that Congress expected Section 1605(a)(4) to provide jurisdiction in cases like this one.

The representation occurred in response to a specific inquiry from Congress on the State Department's record of granting sovereign immunity. Acting Legal Adviser Brower agreed to provide a subcommittee of the House Judiciary Committee with a detailed record of foreign requests for immunity, along with the formal responses given to those requests. Hearings (1973) at 27. In a subsequent letter, Brower attached a list of requests received since 1960, annotating each to indicate how the Department had responded. *Id.* at 49-51.

In that letter, the State Department characterized *City of New Rochelle* v. *Republic of Ghana, Republic of Indonesia*, and *Republic of Liberia*, 255 N.Y.S.2d 178 (County Ct. 1964) – the only case involving suits against foreign states over unpaid taxes on immovable property – as one in which

"no suggestion of immunity was made." Hearings (1973) at 49, 50. In *New Rochelle*, Ghana, Indonesia, and Liberia asked the State Department to intervene to block local governments from foreclosing on properties being used by their respective Permanent Representatives to the United Nations. Their requests to the State Department and their filings in court argued that U.S. courts lacked jurisdiction to hear the case.

The State Department responded that the real property used by the missions was subject to tax, but that immunity nevertheless was appropriate on the narrow grounds that the subject property was being used as the residence of the ambassador to the United Nations and that the city was seeking to foreclose on the property.[12] In advancing this narrow ground for precluding suit, the State Department did *not* endorse the theory, advanced by petitioners and the United States in this case, that foreign states are immune from *all* suits over liens for unpaid property taxes; if that had been the State Department's view, it would not have focused on whether the property had been used to house the U.N. Ambassador or was subject to attachment. The understanding that property tax disputes generally *may* be adjudicated when the property is subject to tax is, presumably, why the State Department informed Congress at the time of FSIA's enactment that the *New Rochelle* case was one in which "no suggestion of immunity" was made. Hearings (1973) at 49, 50.

The court's decision in *New Rochelle* also lends support to the view that there was no blanket state immunity from suits over property taxation in the years before FSIA. After

[12] State Department Note, No. 44 (June 8, 1964), Michael Sandler *et al.*, eds., Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977, reprinted in John A. Boyd, Digest of United States Practice in International Law 1977, 1050 (Jan. 1979). See Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227, Art. 1 & Art. 23 (exempting states from taxes on the premises of the mission, defined to include the residence of the head of mission).

hearing the requests of the foreign states and State Department to dismiss the case, the *New Rochelle* court unambiguously stated that it had the authority to assert jurisdiction. "This court is of the opinion that it *has* jurisdiction of the real property at issue," it declared, "and the question it is considering is whether it will exercise its jurisdiction in these particular proceedings under all of the circumstances." *New Rochelle*, 255 N.Y.S.2d at 179. Ultimately, the *New Rochelle* court declined to exercise jurisdiction so as to avoid "embarrass[ing] the executive arm in its conduct of foreign affairs." *Id.* at 180. In the process, the court cited other decisions to support its two key propositions – that courts indeed possess jurisdiction to hear such cases, and that courts should decline to do so, at the request of the Executive Branch, to avoid interfering with the U.S. government's conduct of international relations. *Id.* at 179-80; see, *e.g.*, *Weilamann* v. *Chase Manhattan Bank*, 192 N.Y.S.2d 469, 471 (Sup. Ct. N.Y. 1959).

This background has a significant bearing on Congress' understanding of the real property exception at the time of FSIA's enactment. In the most directly relevant judicial proceeding, the court concluded that it had jurisdiction to resolve a tax dispute, ultimately declining to do so on narrow grounds not applicable here. And the State Department described the case to Congress as one in which immunity was not recommended. When Congress sought to codify prevailing practice in FSIA, it accordingly had every reason to believe that sovereign immunity did not prevent adjudication of tax disputes involving nondiplomatic property.

III. POST-ENACTMENT AND CONTEMPORARY PRACTICE SUPPORTS THE INFERENCE THAT FSIA WOULD PERMIT SUITS TO DETERMINE THE VALIDITY OF TAX LIENS.

Although FSIA was enacted in 1976, subsequent practice nonetheless also is probative of Congress' original understanding of the Act. In the absence of a clearly demarcated departure from past practice, it is reasonable to assume

that post-1976 international practice tracks the pre-FSIA understanding that Congress meant to endorse. Against that background, four discrete sources of post-enactment evidence support the inference that Congress intended to allow jurisdiction in cases involving the validity of property tax liens: the Third Restatement of Foreign Relations Law, subsequent international law and practice in the field of sovereign immunity, congressional reliance on judicial determinations concerning unpaid property taxes owed by foreign states, and the State Department's own embrace of a broad interpretation of the immovable property exception in post-FSIA litigation.

A. The Third Restatement Makes Clear That Foreign States Are Not Immune From Suits For Unpaid Property Taxes.

The Third Restatement of Foreign Relations Law of the United States is one of the most probative sources of Congress's intent to enact a broad immovable property exception to sovereign immunity. In November 1977, the drafting council began the task of revising the Second Restatement. In laying out its agenda for modifying the provisions on jurisdictional immunities, the council noted that FSIA had "superseded the decisional foundation for the present text," thereby requiring the drafters "to take account of this Act, as well as of such developments as the European Convention on State Immunity." American Law Institute, Proposed Revision and Expansion of the Restatement of the Foreign Relations Law of the United States, Background and Description of the Project, 2, 6 (Nov. 1977). The Third Restatement thus was *premised* on FSIA: "The Foreign Sovereign Immunities Act is law of the United States. Much of it codifies and applies international law as the United States views it * * * . This Restatement adopts the Act as the basis for rules of United States law." Restatement (Third) of Foreign Relations Law of the United States ("Third Restatement") § 395 (1986).

Explicitly noting the source of its text as Section 1605(4), the Third Restatement makes clear that "a state is not immune from the jurisdiction of the courts of another state with respect to claims * * * to immovable property in the state of the forum." Third Restatement, § 455(1)(c). Directly addressing the question at issue here, it further explains that ownership

> by a foreign state does not detract from the desirability of adjudicating controversies in local courts. Premises used for an embassy, consulate, or other diplomatic mission come under this rule, so that controversies relating to rights of ownership, possession, occupation, or use, as well as controversies concerning payment of rent, taxes, and other fees concerning such premises are subject to adjudication in the local courts.

Id., § 455 comment b (1986). The United States seeks to minimize this language on the ground that the Third Restatement is "'controversial.'" U.S. Br. 12 n.8 (citation omitted). But this is a surprising suggestion. Members of the Restatement's drafting council included Ruth Bader Ginsburg and Henry J. Friendly. And the language concerning the immovable property exception changed little in the numerous drafts, with the authors noting shortly before the Third Restatement was published that the text on sovereign immunity had "evoked little debate" among its renowned membership of judges, international law scholars, and practitioners. Tentative Draft No. 6, Volume 1, at 2, April 12, 1985.[13] The

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[13] In addition, the Third Restatement makes clear that it confirms the principles articulated in the Second Restatement, published in 1965 prior to the passage of FSIA: "The previous Restatement reflected the restrictive theory, and § 451 of this Restatement setting forth the basic rule is consistent with §§ 65(1), 68, and 69 of the previous Restatement." Third Restatement § 396.

Third Restatement's view, derived from a close analysis of FSIA, is due considerable weight.

B. Since FSIA's Enactment, Foreign States and International Organizations Have Construed And Applied The Immovable Property Exception Broadly.

Since the passage of FSIA, foreign states and international organizations have broadly interpreted the immovable property exception in clarifying and applying the law of sovereign immunity. Although relatively few court decisions bearing on the precise question of jurisdiction over property tax liens exist because most countries choose to honor their obligations to the nation in which the property is located,[14] a number of states have enacted domestic statutes codifying the law of sovereign immunity as it relates to real property. In addition, there have been several attempts by international organizations and legal scholars to draw up agreements defining the scope of sovereign immunity. While few of these proposals have been enacted into law, together with the statutes they paint a picture of international practice that supports a broad interpretation of the immovable property exception encompassing suits against foreign states over property tax liens.

The most important international effort to codify the law of sovereign immunity since FSIA has been the U.N. Convention on Jurisdictional Immunities of States and Their Property ("U.N. Convention"). The drafters of this Conven-

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[14] In the United States, the closest case on point is *Reclamantes*, which offered the "first and most comprehensive" opinion to interpret the scope of FSIA's immovable property exception. Pet. App. 18. While not addressing the tax issue specifically, then-Judge Scalia indicated "in dicta that a broad range of property interests (including a security interest) can satisfy the exception." Pet. App. 20. The breadth of this reading suggests that the exception would include suits to establish the validity of tax liens.

tion modeled its broad immovable property exception on the EC and FSIA, applying it to disputes relating to rights in, or obligations arising out of an interest in, immovable property. See Stephen McCaffrey, *Current Development: The Thirty-Fifth Session of the International Law Commission*, 78 A.J.I.L. 457, 465 (1984) (noting that Article 13 of the U.N. Convention embodies the exception to state immunity that is contained in section 1605(a) of FSIA and Article 9 of the EC). As with the EC, the reference to "right or interest" in the UN's immovable property exception was intended to have a broad reach. See David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 Am. J. Int'l L. 194, 203 n.53 (2005).

To be sure, as with the EC, there is some evidence from the negotiating history that the U.N. Convention's immovable property exception was not meant to cover tax disputes, instead leaving immunity over such suits to be determined by other sources of law. The drafters of the U.N. Convention wanted to avoid comment on tax suits because they did not intend the Convention to address state-to-state relations at all. See *Sixth Report on Jurisdictional Immunities of States and Their Property*, Sompong Sucharitkul, Special Rapporteur, Agenda Item 3, at 21-25, Art. 17, U.N. Doc. A/CH.4/376 (1984) (Art. 17). But because Congress did not intend to so limit FSIA, the breadth of the U.N. Convention's approach to the immovable property exception generally supports the view that the exception is not restricted to disputes concerning the sovereign's right to title or possession.

Several states have also enacted domestic statutes setting forth the scope of sovereign immunity. For example, in 1985 Australia passed its Foreign States Immunities Act.[15] The Act itself, together with subsequently issued regulations, explicitly makes clear that a foreign state has no immunity from

[15]No. 196 (1985), *reprinted in* Andrew Dickinson *et al.*, eds., State Immunity: Selected Materials and Commentary 469-87 (2004).

proceedings concerning obligations "imposed on it * * * with respect to taxation."[16] Argentina's 1995 law on Immunity of Foreign States from the Jurisdiction of Argentinean Courts is also quite broad, making clear that foreign states "may not invoke jurisdictional immunity * * * in the event of actions over real estate located in Argentina."[17]

Of the other states that have passed domestic sovereign immunity statutes, most have adopted the approach favored by the European Convention. The United Kingdom[18], Pakistan[19], and Singapore,[20] for example, all have domestic stat-

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[16] *Id.* at 478; Foreign States Immunities Regulation, No. 77 (as amended) (1987) (Austl.), available at: http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/87C39DB5671D39CCCA256F8F00181874/$file/1996B00775.pdf.

[17] Immunity of Foreign States from the Jurisdiction of Argentinean Courts, Law No. 24,488 (1995) (Arg.), reprinted in Andrew Dickinson *et al.*, *supra*, at 465.

[18] State Immunity Act (1978) (U.K.), reprinted with commentary in Andrew Dickinson *et al.*, *supra*, at 329-442. See Section 6 (state is not immune "as respects proceedings relating to * * * any interest of the state in, or its possession or use of, immovable property in the United Kingdom; or * * * any obligation of the State arising out of its interest in, or its possession or use of, any such property"); Section 11 (state is not immune "as respects proceedings relating to its liability for * * * rates in respect of premises occupied by it for commercial purposes"); and Section 16 (Act "does not apply to proceedings relating to taxation other than those mentioned in section 11 above"). *Id.* at 372, 383, 414-15.

[19] State Immunity Ordinance No. VI (1981) (Pak.), reprinted in Andrew Dickinson *et al.*, *supra*, at 496-503. See Articles 7, 12, and 17 (statutory language virtually identical to UK State Immunity Act's Sections 6, 11, and 16 quoted *supra* note 18). *Id.* at 498, 500, 503.

[20] State Immunity Act, Ch. 313 (revised version 1985) (Sing.), reprinted in Andrew Dickinson *et al.*, *supra*, at 504-12. See Articles 8, 13, and 19 (statutory language virtually identical to UK State

utes combining broad immovable property exceptions to immunity, explicitly applicable to taxes on property used in commerce, with narrow statements of non-applicability to other matters of taxation. This approach stems from the desire, as the commentary on the U.K. law (on which the others were modeled) makes clear, to confine the scope of the immunity statute – including both the initial grant of sovereign immunity and the exceptions to such immunity – to suits between private individuals and foreign governments.

In addition to domestic statutes enacted after FSIA, a number of international organizations also have prepared draft multilateral agreements on sovereign immunity. While none of these drafts has been enacted into law, they provide a useful window into contemporary international understanding concerning the scope of the immovable property exception. In each case, the exception is broad enough to encompass suits arising from the failure of a state to pay property taxes.

The clearest example of such a provision is the Resolution of L'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement.[21] Article 2(2)(b) of the Resolution makes clear that the courts of the forum state "are competent in respect of proceedings concerning legal disputes arising from relationships of a private law character to which a foreign (State) * * * is a party," including relationships of "ownership, possession, and use of property." *Id.* at 207. Later, Article 2(2)(i) provides that domestic courts "are competent in respect of proceedings relating to fiscal li-

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Immunity Act's Sections 6, 11, and 16 quoted *supra* note 18). *Id.* at 507, 509, 512.

[21] Resolution of L'Institut de Droit International on Contemporary Problems Concerning the Immunity of States in relation to Questions of Jurisdiction and Enforcement (Basle, 2 September 1991), reprinted in Andrew Dickinson *et al.*, *supra*, at 206-211.

abilities, income tax, customs duties * * * and similar impositions provided that such liabilities are the normal concomitant [of] commercial and other legal relationships in the context of the local legal system." *Id.* at 208.

Similarly, the Inter-American Draft Convention on the Jurisdictional Immunity of States contains broad language explicitly barring claims of immunity "in actions involving real property" and "in tax matters regarding [commercial] activities * * * for property located in the *forum* State."[22] Likewise, draft articles prepared in 1994 by the International Law Association for a convention on sovereign immunity declared that states were not immune from jurisdiction in instances where "the cause of action relates to * * * [t]he foreign State's rights or interests in, or its possession or use of, immovable property * * * or [o]bligations of the foreign State arising out of its rights or interests in, or its possession or use of, immovable property."[23] In both cases, the language clearly allows jurisdiction to be exercised in suits over unpaid property taxes. Therefore, laws of foreign states and proposals of international organizations since FSIA's passage further bolster the widely held view that the immovable property exception should be construed broadly to refuse immunity for foreign states involved in tax lien disputes.

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[22] Organization of the American States, Inter-American Draft Convention on Jurisdictional Immunities of States, Articles 5 and 6, reprinted in Andrew Dickinson *et al.*, *supra*, at 201-02. The draft was approved by the Inter-American Juridical Committee on January 21, 1983, but never formed the basis of a binding international agreement.

[23] International Law Association Revised Draft Articles for a Convention on State Immunity (Buenos Aires, 14-20 August 1994), Article III(D), *reprinted in* Andrew Dickinson *et al*, *supra*, at 196.

C. Recent Congressional Appropriations Statutes Show That Congress Still Interprets FSIA To Provide United States Courts Jurisdiction Over Property Tax Suits Against Foreign Nations.

Recent Congressional appropriations statutes offer additional evidence that FSIA provides United States courts with jurisdiction to resolve property tax suits against foreign nations. These statutes penalize states for non-payment of their tax obligations and rely on court decisions to determine the nature of these obligations. See Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2005); Consolidated Appropriations Act of 2005, P.L. No. 108-447, § 543 (2004) (requiring that 110 percent of unpaid property taxes by any country, determined "in a court order or judgment entered against such country by a court of the United States or any State or subdivision thereof," be withheld from foreign aid ordinarily provided to the country).

Of course, these statutes long post-date enactment of FSIA and therefore do not bear directly on Congress' intent in 1976. But as the Second Circuit explained, they do reflect the unbroken understanding that FSIA allows suits against foreign states for unpaid taxes. See Pet. App. 11 (emphasizing "Congress's explicit reliance on the courts to adjudicate the property tax liability of foreign governments"). Nothing in the legislative history hints at equivocation regarding Congress's recent decision. See, *e.g.*, Conf. Report, P.L. No. 108-447, 1017.

D. The United States' *Amicus* Brief In *Englewood* Explicitly States That FSIA Does Not Make Foreign States Immune From Suits For Property Tax Liens.

Finally, one other piece of post-enactment evidence casts considerable light on the meaning of FSIA: the United States' 1985 brief in *Englewood*, which explicitly endorsed

the understanding that Section 1605(a)(4) does not provide immunity for foreign nations involved in property tax disputes. The United States declared in that brief that "Congress never intended that the principle of sovereign immunity should permit foreign governments to ignore their obligations to state and local communities." U.S. *Englewood* Br. 3. Instead, the United States explained, Congress meant FSIA to codify international law, and "international law and practice * * * encompasses generally all rights and obligations arising out of the ownership, possession or use of real property, including real property taxes." *Id.* at 6. The United States also recognized that "Section 1605(a)(4) was intended to codify the restrictive theory of sovereign immunity as applied to actions with respect to real property" (*ibid.*), implicitly rejecting the novel view – which it now advances – that the provision intended to codify the exception as recognized under the theory of absolute immunity. The United States went on to criticize the lower court's opinion in *Englewood* on the ground that it "would deny jurisdiction in cases which Congress explicitly had intended to make justiciable." *Id.* at 7. And, as we note above, the United States argued that under Section 1605(a)(4), *both* the holder of a tax lien *and* the owner of the property burdened by the lien have "rights in immovable property * * * in issue." U.S. *Englewood* Br. 11.

In a curt footnote to its brief in the instant case, the United States recants its filing in *Englewood*. U.S. Br. 19, n. 15. We agree with the United States that a foolish consistency is the hobgoblin of little minds. But the United States would deserve more credit for its admission of error were it to give a persuasive explanation for its change in position. It says now that its previous filing erred because it overlooked Article 29 of the EC. But as we have explained, its *current* filing also misstates the significance of that provision. The United States likewise says nothing to explain away its prior analysis of settled law showing that a lien establishes a right in property. And it wholly disregards its prior declaration that

"Congress never intended that the principle of sovereign immunity should permit foreign governments to ignore their obligations to state and local communities." These statements, made closer in time to enactment of FSIA, got it right.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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